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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-997

YESHIVA UNIVERSITY FACULTY ASSOCIATION,

Petitioner,

v.

YESHIVA UNIVERSITY,

Respondent.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The intervenor-petitioner, Yeshiva University Faculty Association ("Union"), prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the court of appeals (App. A, *infra*, 1a-42a) is reported at 582 F.2d 686. The Board's decision and order (App. C, *infra*, 45a-62a) are reported at 231

N.L.R.B. No. 98. Its decision and direction of election in the underlying representation proceeding (App. D, *infra*, 63a-79a) are reported at 221 N.L.R.B. 1053.

Jurisdiction

The judgment of the court of appeals (App. B, *infra*, 43a-44a) was entered on July 31, 1978. On October 18, 1978, Mr. Justice Marshall extended the time for filing this petition for a writ of certiorari to December 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the faculty of Yeshiva University ("the University") are supervisors or managers pursuant to Section 2(11) of the National Labor Relations Act ("the Act"), 29 U.S.C. 152(11), as interpreted and applied by the National Labor Relations Board ("the Board") in its decision in the underlying representation proceeding.

2. Whether there exists substantial evidence in support of the findings and conclusions of the Board in its decision in the underlying representation proceeding.

Statutes Involved

The relevant statutory provisions are set forth in App. E, *infra*, 80a-81a.

Statement

The history of the underlying proceedings, the structure of the University, and the respective roles of faculty and

administration in the governance of the University are set forth in the Petition of the Board, pp. 2-16. Additional relevant factual material has been incorporated in this Petition in the following section.[1]

Reasons for Granting the Petition

1. The Board's conclusion that the faculty of the University are neither managers nor supervisors was a proper and reasonable application of the Act in view of:

(a) the status of faculty as professional employees pursuant to Section 2(12) of the Act, 29 U.S.C. 152(12);

(b) the action of the faculty in the decision-making processes of the University is on their own behalf, rather than in the interest of the employer;

(c) such action of the faculty is collective; and

(d) such action is effectively subject to the authority of the University administration and Board of Trustees.

These grounds in support of affording faculty in higher education protection under the Act have been consistently applied by the Board, and have been approved and applied accordingly by the First Circuit of the United States Court of Appeals (*Boston University*, 228 N.L.R.B. 1008 (1977), enforced, 575 F.2d 301 (1st Cir. 1978), petition for cert.

[1] References to the record of the underlying proceedings are described as follows: "A." refers to the joint appendix filed in the Court of Appeals; "Tr." refers to the transcript in the representation proceeding; and "U. Exh." and "Union Exh." to University and Union exhibits, respectively, in that proceeding.

pending, No. 78-67). The decision of the Court of Appeals in the instant proceeding, however, concluded that the foregoing grounds applied by the Board in support of affording coverage under the Act to the University faculty were "unjustified [and] arbitrary" (App. A, *infra*, 42a).

There therefore exists a conflict between the circuit courts and between the Second Circuit and the Board with respect to the standards applicable to the determination of the status of faculty in higher education under the Act. This issue is a significant and recurrent one, affecting over sixty existing faculty bargaining units at other institutions of higher education under the jurisdiction of the Board[2] and all other faculty in private, higher education who may hereafter seek coverage of the Act. Review by this Court is therefore warranted.

a. There has been no dispute in these proceedings as to the status of the University faculty as professional employees (App. A, *infra*, 25a). The court below concluded, however, that the faculty are employed not only as professionals, but also as supervisors and managers (*id.* at 42a).

While the Act excludes supervisors from its coverage,[3] it includes express provisions for the inclusion of profes-

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[2] See *Faculty Unionization: Summary of Bargaining Agents*, the Chronicle of Higher Education, May 31, 1977, p. 4. Before the lower court, the American Association of University Professors and the American Federation of Teachers, AFL-CIO, participated as *amicus curiae* in support of the petition of the Board; and New York University, Northeastern University, Boston University, Fairleigh Dickinson University, and the University of Vermont, in opposition to the petition.

[3] The definition of "employee" contained in Section 2(3) of the Act, 29 U.S.C. 152(3), excludes "any individual employed as a supervisor." See App. E, *infra*, 80a .

sional employees.[4] These dual directives are directly counterposed in the determination here at issue. The Board has in a consistent line of precedent balanced these legislative enactments in determining that faculty action in the areas of authority enumerated in Section 2(11) of the Act, 29 U.S.C. 152(11),[5] derive from their professional status and mission rather than their alignment or identification with the employer and its mission.[6]

The professional status of the University faculty, as contemplated in the legislative and adjudicatory history of the Act, does not preclude a finding of their status as managers or supervisors, but requires a distinction between their identification as professional employees and as supervisory or managerial representatives. The court below failed properly to weigh or consider this distinction in determining the status of the University faculty.

At the same time Congress acted to exempt supervisors from coverage under the Act on the grounds that they are

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[4] Section 2(12) of the Act, 29 U.S.C. 152(12), defines the term "professional employee." See App. E, *infra*, 81a. Section 9(b)(1), 29 U.S.C. 159(b)(1), precludes the Board from placing professional employees in the same unit with employees who are not professional employees "unless a majority of such professional employees vote for inclusion in such unit."

[5] See App. E, *infra*, 80a-81a.

[6] See fn. 8, *infra*, and *Syracuse University Law School*, 204 N.L.R.B. 641 (1973); *University of San Francisco Law School*, 207 N.L.R.B. 12 (1973); *New York University Law School*, 205 N.L.R.B. 4 (1973); *Fairleigh Dickinson University*, 205 N.L.R.B. 673 (1973); *Adelphi University*, 195 *N.L.R.B.* 639 (1972); *College of Pharmaceutical Services*, 197 N.L.R.B. 959 (1972); *Fordham University Law School*, 193 *N.L.R.B.* 134 (1971); *Kendall College*, 228 N.L.R.B. 1083 (1977); *Wentworth Institute*, 210 N.L.R.B. 345, enforced, 515 F.2d 550 (1st Cir. 1975); *Loretto Heights College*, 205 N.L.R.B. 1134 (1973); *Boston University*, 228 *N.L.R.B.* 1008 (1977), enforced, 575 F.2d 301 (1st Cir. 1978), petition for cert. pending, No. 78-67.

"traditionally regarded as part of management" (S. Rep. No. 105, 80th Cong., 1st Sess. at 3 (1947), Congress provided that professional employees be allowed organization under the Act in presumptively separate bargaining units.[7] Section 2(12) of the Act, 29 U.S.C. 152 (12)(b), not only recognized that the independent judgment and discretion inherent in the fulfillment of the professional employee's mission do not necessarily render him a supervisor, but also that professional employees often work collectively with junior professionals "under the supervision of a professional." Thus the definition of a professional, the legislative history indicates, "covers such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants." H.R. Rep. No. 510, 80th Cong. 1st Sess. at 36 (1947).

The court below acknowledged that the authority of the University faculty to determine course content, teaching method, and student evaluation fell within Section 2(12) of the Act and "should not characterize them as managerial or supervisory" (App. A, *infra*, 26a). But because the faculty exercise what the court described as "extensive control" with respect to curriculum, workload, rank, salary and tenure of other faculty, and other University policy, "they are no longer exercising individual professional ex-

[7] The express legislative inclusion of professionals under the definition of covered employees followed substantial testimony exhorting the Congress to exclude all professionals as managerial representatives. The enactment of sections 2(12) and 9(b) of the Act rejected those contentions. Hearings on amendments to the National Labor Relations Act before the House Comm. on Education and Labor, 80th Cong., 1st Sess. 1225 (1947); Hearings on S. 55 and S.J. Res. 22 Before Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess. 694 (1947).

pertise [but are] in effect, substantially and pervasively operating the enterprise'' (*id.* at 27a).[8]

The court mistook the role of the faculty in the fulfillment of their individual professional missions for their interest in ''operating the enterprise'' (*id.*). The role or mission of the professional employee may often merge with the mission of his employer. For the hospital physician, for example, it is to render the highest quality of medical care; for the community legal service lawyer, the delivery of the most effective advocacy and representation; and for the faculty member, the practice of optimum didactic skills. While the hospital, legal services program or university may be dedicated in purpose to corresponding aspirations, they must be operated with a separate, even sometimes conflicting perspective related to fiscal and other managerial constraints.

Professional employees may participate with their employer in seeking the highest calibre of co-professionals to complement by specialty, discipline or experience the balance of a department; they may participate in self-evaluation of their colleagues and programs; they may advise the employer with respect to the means of improving the rendering of their services. Their decision to discharge or operate on a patient, to appeal a judicial ruling, or to deny or grant admission to certain students may all affect the employer's finances or policy.

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[8] The second point of this argument, *infra* at pp. 32-42, addresses the evidence on which the Board relied in determining the extent to which the University faculty exercise such authority. Notwithstanding the conclusion of the Board that the nature and extent of the faculty role and authority at the University, which "are not significantly different from what they were in [Northeastern Univ., 218 N.L.R.B. 247 (1975); University of Miami 213 N.L.R.B. 634 (1974); Fordham University, 193 N.L.R.B. 134 (1971); and C. W. Post Center of Long Island Univ., 189 N.L.R.B. 904 (1971)]," did not render them supervisors (App. D., *infra*, at 68a), the court construed the evidence to the contrary.

These actions, however, do not derive from managerial or supervisory prerogatives. They are rather the fulfillment of the discretion and expertise inherent to the professional and implicit in his job responsibilities. They operate in no vacuum, but are subject to legal, regulatory and professional constraints,[9] as well as the policy limitations of the employer.

Thus the record here shows involvement of the University faculty in many areas of faculty governance. That involvement, however, is not only defined by their professional identity, but is confined by managerial policy over which they exercise no control and subject to supervisory authority in which they do not share. The governing body of the University is the Board of Trustees which includes no faculty (A. 1310). The Executive Council sits under the Board of Trustees and is appointed by the President, statutorily limited to university officers (A. 1948). The University, officers and administration include no faculty in the bargaining unit, and the deans of each school are their respective chief administrative officers, reporting to the University Vice-Presidents and President (A. 36-37, 63, 184-85, 141; Tr. 155).

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[9] In the hospital context, for example, the Joint Commission on the Accreditation of Hospitals requires for accreditation (and therefore third-party reimbursement to hospitals) that there be an "organized medical staff [with] overall responsibility for the quality of all medical care provided to patients, and for the ethical conduct and professional practices of its members as well as accounting therefor to the governing body." *Accreditation Manual for Hospitals, 1973,* at 35. For the attorney, his conduct is governed by the applicable canons of ethics, which necessarily determine his obligations and responsibilities to his client, mandating compliance with those canons before even his employer's regulation. In higher education, teaching method has been protected by the 1940 *Statement of Principles on Academic Freedom and Tenure* of the American Association of Colleges and the American Association of University Professors, almost uniformly adhered to among institutions of higher education. Furniss, *Faculty Tenure and Contract Systems: Current Practice,* American Council on Education Special Report (July 27, 1972).

The President is exclusively authorized to hire full-time faculty upon recommendation of the dean or director of each school (A. 1491). Prior to any recruitment of new faculty, he must authorize the filling of an open position (A. 813; Tr. 3660). The dean or director will interview and screen the merits of each candidate after preliminary screening by faculty (A. 313, 450, 813, 1107). When the recommendations are forwarded to the President, he actively participates in the decision-making (A. 1089, 1130).

Rank, salary rate and term of appointment accompany the President's appointment. Although faculty at two schools submit recommendations in these regards (A. 812, 817, 1181), the available budget line authorized by the administration generally determines the rank and salary of a new appointee (A. 814, 1035, 1174). With respect to the discipline of faculty members, the record here is silent as to any involvement by faculty members, individually or collectively.

Most schools of the University have faculty committees which submit recommendations on faculty promotions to their respective deans (A. 287, 438, 662, 795, 968, 1167, 1333). The dean then refers his own recommendation with that of the faculty committee for an independent review by the Vice-President for Academic Affairs, who has on a number of occasions rejected the recommendations of faculty in his denial of promotions (A. 286, 1163, 1168, 1333). The role of the Vice-President of Academic Affairs is central in this and most other faculty personnel decisions, as he described it:

> "All recommendations for promotion finally wind up on my desk . . . I evaluate them . . . [and] in the course of going through these recommendations, therefore it is common for me to have to be in touch with the dean to ask for additional information, or to express problems that I am having in seeing how

> that recommendation is arrived at . . . I have had conversations with almost every dean who has recommended every promotion in those terms (A. 88-90).
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> * * *
>
> "[After consultation with the dean, I draw my own conclusion] so it becomes clear to me that it is **not merely** sort of an internal routine rubber-stamp promotion." (A. 92).

Tenure rules and procedures are promulgated by the Board of Trustees and were recently—and unilaterally—revised by the Board (A. 1501-05). The President has the sole authority, acting on behalf of the trustees, to grant tenure (A. 1503), and the record here indicates that this authority is independent and absolute. Most schools do not even have a formal review procedure prior to the award or denial of tenure (A. 1034); Tr. 2817, 4122), although some departments or committees may make recommendations to the President through the deans, who have effectively vetoed or blocked faculty recommendations for tenure (A. 361, 1005, 1228).

Faculty input in these decisions is not insignificant. The faculty may refer prospective new hires who are professional colleagues or associates. They may weigh and consider the qualifications of the individual as they relate to the *academic* needs and program of the department or school. They may advise the administration of the professional merits or distinction of the work of a colleague, even as it may relate to his standing in the department or school. But the role of the faculty of Yeshiva University in these areas is advisory, at best, and circumscribed by the scope of professional expertise of the faculty as it relates to the academic or professional judgment involved.

Despite the exercise of such judgment by faculty, the needs and exigencies of the institution ultimately govern. University administration applies a separate and distinct perspective to the decisions referred to it. While the faculty may render professional judgment on the merits of a professional, University officers first independently review that judgment and then balance its consequences with managerial and fiscal policy in which the faculty play no determinative or advisory role.

The record indicates that the administration has not only rejected faculty judgments on academic merits in these personnel decisions, but that its unilateral determination of managerial policy has even precluded advice and consultation from the faculty. Thus in 1971 and 1972, the President froze all faculty ranks and notified the faculty that no promotions or salary increase would be granted at the University (A. 1257, 1633). At one school, the President froze all promotions between 1971 and 1974 (A. 1333).

The lower court nonetheless characterized faculty involvement in such decision-making processes as "shared authority" in the governance of the University (App. A, *infra,* 35a-36a). Even if deference were allowed to the fact-finding of the court, it assessed the role of the faculty without a distinction between its role *as professionals* in determinations affecting the integrity of the academic programs of the University and its role in determining managerial policy as it implicates the operation of the University. It is this same distinction which allows professional employees coverage under the Act, but disallows their address to managerial prerogatives in the arena of collective bargaining.

The accommodation between collective bargaining and managerial prerogatives confines the former to hours,

wages, and terms and conditions of employment, as section 8(d) of the Act, 29 U.S.C. 158(d), specifies. The Act leaves beyond the scope of mandated bargaining the input of professionals in the quality or character of the services delivered by the employer, which subjects remain under the ultimate and unilateral authority of management. Separating out those matters amenable to the bargaining relationship and those reserved to management is the function of the Board. The proper scope of faculty bargaining is thus not the academic integrity of the University's "product," but the economic matters of faculty hours, wages, and working conditions—a distinction plainly capable of administration.

When the House Committee on Education and Labor recently considered the question of the coverage under the Act of interns and residents, it favored legislative reversal of the decision of the Board, *Cedars-Sinai Medical Center*, 223 N.L.R.B. 251 (1976), which excluded them on the grounds that they were primarily students. The Committee noted the analagous experience of faculty and other professional employees under the Act

> "The other objection cited in *Cedars-Sinai*, and voiced by some witnesses opposed to the bill, was that house staff collective bargaining would necessarily implicate matters of education that are not suited to the bargaining process. . . . We find this objection untenable. The act limits the scope of collective bargaining to wages, hours, and terms and conditions of employment, and we are confident that the Board can and will confine housestaff bargaining to such matters as distinct from those which are solely didactic in nature. Newspaper reporters bargain without improperly implicating freedom of the press,

> faculty at religious educational institutions bargain without improperly implicating freedom of religion, faculty at educational institutions bargain without improperly implicating academic freedom, and housestaff can bargain without improperly implicating their education. State and local labor relations agencies have been able to distinguish proper subjects of housestaff bargaining—such as wages, vacations, hours, insurance coverage, uniforms, laundry, meals, on-call rooms, tenure, etc.—from purely educational matters, and we believe the Board can do the same." H.R. Rep. No. 95-980, 95th Cong., 2d Sess. 6 (1978). (Citations omitted).

Whatever else the faculty and university administration relationship entails, it surely requires an address to faculty salaries, insurance benefits, work schedules, etc.—the staples of all collective bargaining contracts. The decision of the lower court fails to separate out in the faculty-administration relationship the economic subjects which are bargainable from those subjects of educational policy which are not. The Act mandates the performance of precisely that function of the Board. *See* Finkin, *The NLRB in Higher Education*, 5 U.Tol.L.Rev. 608 (1974). Although the University management and its faculty may share certain interests and even some expertise in fundamental aspects of the University's operations, the faculty may not impose that standing or expertise in the collective bargaining relationship where it does not affect their "hours, wages, and terms and conditions of employment" (29 U.S.C. 158(d)).

The precise experience of the Yeshiva University faculty in dealing with its administration over hours, wages, and terms and conditions of employment underscores the dis-

parate standing and the distinct interests of the faculty vis-a-vis its management. That experience has borne out, on one hand, the practicability of a bargaining relationship at the University; and on the other hand, the shortcomings of that relationship without the protection of the Act.

Salary scales for most full-time faculty have long been determined according to negotiations between faculty welfare committees and University administration. Yeshiva College and Stern College, for example, have negotiated jointly with the University administration since 1968 in the determination of faculty salary scales (Tr. 4152; Union Exh. 107). The welfare committees from both schools consist of elected members of the full-time faculty (A. 363; Tr. 2534). Most recently these welfare committees have jointly negotiated with the Vice-President for Business Affairs, establishing salary rates for all full-time faculty at both schools, including department chairmen and senior faculty (A. 1259, 1634). These rates are also given effect for the full-time faculty at Erna Michael College, one of the Jewish Studies Programs for the students of Yeshiva College (A. 543). The Yeshiva-Stern Welfare Committees have also taken up matters of fringe benefits and pensions, as well as retirement age (A. 1259-1262).

The Werzweiler Graduate School faculty Welfare Committee acts on behalf of the full-time faculty at Werzweiler in collective bargaining (A. 1017). This welfare committee last negotiated with the University Budget Committee, composed exclusively of University administration and the dean of Werzweiler, and settled a two-year agreement of across-the-board salary increases for the entire full-time faculty (A. 1019; Tr. 3610).

The faculty Welfare Committee at the Ferkauf Graduate School was established in 1967 pursuant to the School's

by-laws and subsequently established a salary scale for the full-time faculty there. It has been authorized to represent the faculty over such issues as sabbatical and sick leaves, retirement benefits, life insurance, etc. (Tr. 4060). The Welfare Committee at Ferkauf also bargained with the University Budget Committee in 1973, submitting proposals on such issues as salary increases, retirement age, and promotional salary increments (A. 249a, 1236).

The full-time faculty at the Belfer Graduate School established a welfare committee in 1972, which in March 1973, also submitted salary proposals to the University administration for its full-time faculty (A. 905, 1312). In the course of the spring and fall of 1973, the Ferkauf and Belfer Welfare Committees discussed their joint interests and reorganized as the Yeshiva University Graduate Faculty Association, and in September, 1973 submitted to the President a demand for recognition and collective bargaining demands for the full-time faculty at both the Ferkauf and Belfer Graduate Schools (Union Exh. 17). The President responded through the respective deans:

> "I have been asked to inform you that University policy mandates that we pursue established channels of communication and procedure—*i.e.*, the Dean continue to confer with faculty committees and individual faculty members of the School on all administrative and academic matters. . . . I am therefore asking again that the members of the Welfare Committee meet with me and the University Budget Committee so that I can complete the necessary discussions on the current budget. . . ." (Union Exh's 18, 118).

Sabbatical policy is University-wide and set forth in the Faculty Handbook (A. 1506). In 1972, that policy was

amended by the Board of Trustees unilaterally to limit the options available to the faculty (A. 103-04). That action was in response to budgetary problems at the University, and the faculty were allowed no part in the reformulation of that policy (*id.;* A. 1273).

The retirement age of full-time faculty is also set forth in the Faculty Handbook, as established by the Board of Trustees, and any permission to extend the retirement age on a semester-by-semester basis must come from the President (A. 104). The Yeshiva College faculty, joined by the Stern College faculty, recently sought to discuss through their welfare committees policy in this area, but the President refused to accept faculty action on this subject (A. 1287-88).

Faculty fringe benefits, including medical, hospital and life insurance, pension, tuition grants to relatives, and allocations for professional travel (requiring the dean's permission) are also set forth in the Faculty Handbook, as unilaterally formulated and approved by the Board of Trustees (A. 1507-08).

The faculty have accordingly established some bargaining history with University management. Those negotiations and "agreements" have been limited to areas traditionally covered in collective bargaining. The management of the University has not "bargained" with the faculty over its prerogatives, but has allowed the faculty a voice in issues of academic programming only consistent with their professional expertise. That faculty voice has been heeded only insofar as management, in its unfettered discretion, finds its message consistent with the policy or fiscal constraints of the University. Coverage of the University faculty under the Act would not disturb the nature or balance of that relationship.

In matters of curriculum and student affairs, faculty involvement is precisely limited to areas of their professional expertise, and ultimately checked by supervisory or managerial authority. Faculty play an active role in the formulation and development of curriculum, as do the deans and even the students at the University (A. 583, 664, 930, 1061, 1150). This role at various schools may be through committees, departments, faculty (and student) assemblies (*id.*). In each case the faculty usually act by consensus, with the dean's usual approval following (*id.*). The faculty may in a similar context work out requirements for majors and undergraduate degrees, as well as standards for admissions, grading, examinations and graduation, although they must conform, where applicable, to requirements of the New York State Department of Education (A. 283, 290, 427, 557, 673, 727, 934, 940, 957, 1067, 1146, 1154).

In each of these areas, faculty action is nonetheless circumscribed by University policy and direction, with direct participation and direction from University officers, such as the Vice-President for Academic Affairs, the Registrar, and deans and directors of the schools. Thus the Vice-President for Academic Affairs testified:

> "All of our academic planning at the university has financial implications and financial needs, and therefore, just as I supervise and coordinate the academic planning throughout the university, Dr. Socol does so with respect to the fiscal wherewithal for such planning. He is the head of what they call the Office of Financial Services, of the university." (A. 115).

The Registrar likewise takes part in questions regarding student standards and grading (A. 1157-58, 1220-21), while students will also often be allowed to contribute to decision-

making in these areas as members of various curriculum and standards committees, as well as members of other student-faculty bodies at most of the schools (A. 416, 669, 964). Moreover, the deans play an active role in each of these areas, usually maintaining the final authority at each school to implement any change in curriculum or standards (A. 298, 425, 673, 705, 1150, 1283).

One dean characterized the activities of the curriculum committees as "a self-evaluation process" (Tr. 3897). As a fundamental incident to their professional role, faculty unquestionably structure their own courses and examinations, review the curriculum of their departments and develop new curriculum. In each of the schools, as separate collegiate bodies, they evaluate their own professional performance, as well as the performance of their students. Most directly involved in the student-faculty interface, they also establish standards for student performance and admissions—all, however, subject to approval of higher, administration authorities, who maintain and act on their authority to direct, manage and ultimately approve or disapprove of collegiate faculty action. With even Committees on Committees (Tr. 2372), faculty action in this area originates in an intricate committee structure which generally refers all action to the faculty as a whole, where the collegiate consensus is referred to the dean for his action within the constraints set and enforced by the University administration. The hierarchy is the same at each school and division, with the ultimate authority with the deans and administration to restrict and define policy according to that which emanates down from the Board of Trustees, rather than up from any collegial body of faculty.

While faculty, like other professional employees, exercise substantial authority in "matters of importance to the

employer's financial and other managerial interests," Congress nevertheless chose to afford them protection and coverage under the Act. *Westinghouse Electric Corp.*, 163 N.L.R.B. 723, 726 (1967), *enf'd*, 424 F.2d 1151 (7th Cir. 1970), *cert. denied*, 400 U.S. 831. The Board explained in *General Dynamics Corp., Convair Aerospace Div.*, 213 N.L.R.B. 851, 857-58 (1974):

> "Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, professional employees plainly are not the same as management employees either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction. Likewise, technical expertise in administrative functions which may involve the exercise of judgment and discretion does not confer executive-type status upon the performer. A lawyer or a certified public accountant working for, or retained by, a company may well cause a change in company direction, or even policy, based on his professional advice alone, which, by itself, would not make him managerial."

This recognition of the role of the professional relative to the mission of his employer was again considered by Congress in its enactment of recent amendments to the Act to provide coverage for employees employed in not-for-profit health care institutions. Congress rejected an opportunity to amend section 2(11) of the Act to exclude certain professionals from the definition of "supervisor," but in so doing both the House and Senate reports emphasized the

distinction between supervision in the interest of the employer and supervision in a professional capacity in aid of a professional mission:

> "The Committee has studied [§ 2(11) of the Act] with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians, and concludes that the proposed amendment is unnecessary because of existing Board decisions. The committee notes that the Board has carefully avoided applying the definition of 'supervisor' to the health care professional *who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer.*
>
> "The Committee expects the Board to continue evaluating the facts of each case in this matter when making its determinations." S. Rep. No. 93-766, 93 Cong., 2d Sess. at 6 (1974) (emphasis supplied).[10]

The lower court failed to review this statutory history, as it affects both the definition of professional employee's coverage under the Act and the congressional sanction of the Board's exercise of jurisdiction over institutions of higher education and their professional faculty. In 1947, amendments to the Act were proposed by the House of Representatives, providing that all charitable and educational

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[10] The Board has carefully limited its definition of health care professionals as supervisors, separating their "primary and indeed overriding responsibility . . . to maintain the best possible patient care" from alleged supervisory action in the interests of the employer. *Mercy Hospitals of Sacramento*, 217 N.L.R.B. 765, 767 (1974). See also *St. Mary's Hospital*, 220 N.L.R.B. 496 (1975); *Trustees of Noble Hospital*, 218 N.L.R.B. 1441 (1975).

organizations be excluded from Board jurisdiction. In the companion Senate legislation, the exclusion was limited to not-for-profit hospitals. In the Joint Conference Report of representatives from the House and Senate, the Senate proposal was adopted because, as the Joint Conferees acknowledged, the Board had already concluded on its own part that most charitable and educational organizations were excluded from coverage under the Act on the grounds of their insubstantial effect on interstate commerce. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947).

In *Trustees of Columbia University*, 97 N.L.R.B. 424 (1951), the Board accordingly cited the joint conference report in explaining its refusal to assert jurisdiction over institutions of higher education. Subsequently, that decision and its reasoning were overruled by the Board in *Cornell University*, 183 N.L.R.B. 329, 331 (1970), where the Board concluded:

> "The fact remains that Section 2(2) contains no express exemption for non-profit employers and that subsequent legislation has indicated a congressional preference that the Board should favor asserting jurisdiction in lieu of creating a no-man's land of non-regulation."

In 1974, legislation came before the Congress to include not-for-profit health care institutions under Board jurisdiction. By that time the *Cornell University* precedent and its progeny were enconced in a line of Board precedent, consistently asserting jurisdiction over institutions of higher education and their faculty. In the 1974 amendments to the Act, no debate or controversy arose over the jurisdiction assumed by the Board over institutions of higher education or their faculty, while the sole remaining exclusion of not-for-profit employers was removed as health

care institutions were legislated under Board jurisdiction. PL 93-360, 88 Stat. 395 93rd Cong., 2d Sess. (1974).

The Senate Report on the 1974 amendments to the Act (S. Rep. No. 93-766, 93rd Cong., 2d Sess. 2-3 (1974)) concluded that there was "no acceptable reason" why hospital employees should remain excluded from coverage. With the Board having already assumed and exercised its jurisdiction over faculty in higher education, the Congress completed the circle of coverage afforded under the Act to employees of not-for-profit institutions. As the Congress specifically intended to extend coverage to specific professional health care employees under the 1974 amendments to the Act, it looked to the Board's prior interpretations of the supervisory exclusion to professional employees. At that time, the Board had well enunciated its standards and principles relative to the application of the Act to faculty in higher education.[11]

The lower court has now rejected those standards as "unjustified [and] arbitrary" (App. A, *infra*, 42a). Its decision rejects not only the soundness of those standards as relied upon by Congress, but as consistently applied by the Board[12] and as recently upheld by the First Circuit Court of Appeals in *Boston University, supra.*

In *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. 267 (1973) this Court summarized principles of statutory construction relevant to the history of legislative amendments to the Act and the Board's consistent application of coverage under the Act for faculty employed in higher education:

> "[A] court may afford great weight to the long-standing interpretation placed on a statute by an

[11] See fn.'s 6 and 8, *supra.*

[12] See fn. 6, *supra.*

> agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. *In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.*" *Id.* at 274-75. (emphasis supplied; citations omitted).

The decision of the lower court stands alone in its finding that the Board's standards, as applied in virtually all cases involving faculty in higher education, are in conflict with the Act.

b. & c. The court recognized that the Board has consistently denied managerial or supervisory status to faculty in higher education on the grounds that the faculty act on their own behalf and not on behalf of the employer (App. A, *infra*, 32a-33a). The court rejected this finding and conclusion of the Board and found that faculty action in university governance is rooted in "the very nature of the educational process" and based on the concept of "shared authority," originating in the Middle Ages (*id.*). In sum, the court said, there is "no significant divergence between the interests of the faculty and those of the administration or the Board of Trustees" (*id.* at 32a). The Board's "attempt" to dichotomize those interests, it said, is a "strained, artificial separation" because:

> "... the faculty has initiated, and the administration has repeatedly accepted, major policy determinations which constitute *the essence of the University's educational venture.* We cannot conclude that the full-time faculty here has acted in its own interest." *Id.* (Emphasis supplied).

In its "interest analysis" the court fails to recognize or distinguish the professional mission of the faculty as em-

ployees relative to the responsibility of the employer to operate the institution according to exigencies and considerations beyond the University's "educational venture." Thus the decision of the court is silent with respect to the relationship between the faculty and administration in the processes affecting the determination of faculty hours, wages or terms and conditions of employment. The court focuses on "shared authority" in action relative to the merits of the academic programs or "educational venture" of the institution[13].

It is clear that a determination of either supervisory or managerial status requires a finding that the employees act in the interest of the employer. Section 2(11) of the Act, 29 U.S.C. 152(11), thus defines those areas of authority in which an employee must act "in the interest of the employer" to render him a supervisor. In *Jas. H. Matthews & Co.* v. *N.L.R.B.*, 350 F.2d 432, 434-35 (8th Cir. 1965), *cert. denied*, 385 U.S. 1002, the court summarized the relevant judicial analysis in review of a Board decision determining the nature of an employee's exercise of authority in the areas enumerated under Section 2(11) of the Act:

> " '[I]t is not alone that (the employee) may hire or fire or lay off or discipline. He must do so in the interest of the employer * * * (T)here must be a determination of status based upon the 'nature' of the supervisory position and 'how completely the responsibilities of the particular position identify the holder of the position with management,' all 'because of the infinite possible variations in responsibilities

[13] While the Union recognizes the relevance of the input of the faculty in these areas, it must also respectfully differ with conclusion of the court that "the University has accepted [such input] without hesitation so consistently" that the Board's determination that faculty act in their own, rather than in the interest of the employer, is erroneous. See pp. 32-42, *infra*.

> enumerated in § 2(11)' * * *'' *International Union of United Brewery etc. Workers* v. *N.L.R.B.*, 111 U.S. App. D.C. 383, 298 F.2d 297, 303, *cert. denied*, 369 U.S. 843, . . . (quoting from *Local 636, Plumbers* v. *N.L.R.B.*, 109 U.S. App. D.C. 315, 287 F.2d 354, 362).'' [14]

The court then continued to discuss its discretion in review of the Board's determination on this subject:

> ''And where, as here, 'the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. * * * (T)he Board's determination * * * is to be accepted, if it has 'warrant in the record' and a reasonable basis in law.' *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 131. . . . '' *Jas Matthews & Co.* v. *N.L.R.B.*, *supra* at 435.

A similar analysis pertains to the determination of managerial status under the Act. This Court concluded in *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. 267, 286-87 (1974), that employees who ''formulate and effectuate management policies by expressing and making operative the decisions of their employer'' are excluded from coverage under the Act. In the Court's lengthy analysis of the legislative and adjudicatory history supporting its holding, the Court approved the criteria for determining managerial status already applied by the Board and the courts, which inquired

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[14] Those who exercise such responsibilities in their own interest are *not* supervisors under the Act. See *Stop & Shop Companies, Inc.* v. *N.L.R.B.*, 548 F.2d 17, 19 (1st Cir. 1977); *N.L.R.B.* v. *Wentworth Inst.*, 515 F.2d 550, 557 (1st Cir. 1975); *International Ladies' Garment Workers' Union* v. *N.L.R.B.*, 339 F.2d 116, 121 (2d Cir. 1964).

whether the employee's interests are "more closely identified" or are "closely aligned" with management.[15] *Id.* at 283-89. In remanding to the Board, the Court instructed: "[T]he question whether particular employees are 'managerial' must be assessed in terms of the employees' actual job responsibilities, authority, *and relationship to management.*" *Id.* at 290, n. 17 (emphasis supplied).

The lower court's decision effectively determines that the *entire* faculty of the University are "closely aligned" and "identified" with management, in whose interests they exercise their putative supervisory authority. The court does not distinguish among members of the faculty—instructors or other non-tenured faculty, relative to senior professional faculty or even department chairmen. For the purpose of its determination of the nature of authority which faculty exercise—its "interest" analysis—the court depends on a collectivization of the faculty voice and authority. It cites no evidence of individual faculty members exercising the authority it defines as "shared authority" (App. A, *infra*, 35a).

But when the court considers the criterion of the Board that the collectivization of faculty authority militates against a determination of their supervisory or managerial status, it incongrously concludes that the "collective authority" doctrine is not a "realistic interpretation" of section 2(11) of the Act, 29 U.S.C. 252(11), and rejects its application to the definition of supervisory status (App.

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[15] The decision notes the basis for exclusion of managerial employees under the Act summarized in *Retail Clerks Int. Ass'n.* v. *N.L.R.B.*, 366 F.2d 642, 645 (D.C. Cir. 1966) (Burger, J.), *cert. denied*, 386 U.S. 1017: "Congress intended to exclude from the protection of the Act those who comprised a part of 'management' or were allied with it on the theory that they were the one[s] from whom the workers needed protection." 416 U.S. 288-289, n. 16.

A, *infra*, 31a).[16] But even if the Board's interpretation is valid, the court notes, the faculty are, collectively, managerial employees, excluded under the rationale of *N.L.R.B.* v. *Bell Aerospace Co., supra* (App. A, *infra*, 31a-32a).

Under the court's analysis, each newly hired instructor, as well as his department chairman and every faculty member in between, formulate and effectuate policy with an alignment and identification with management. The court thus holds that all faculty are supervisors and managers, although they manage or supervise no other full-time faculty. The entire faculty are, the court seems to say, supervisors who supervise no subordinates;[17] managers, who manage no other personnel. All full-time faculty, along with the deans, administrators, Vice-Presidents, the President and Board of Trustees stand together, the court would have it, as a "collegiate," managerial body, including every full-time professional member of the academic community of the University. The consequence of the court's decision is to render the inclusion of professional employees under the coverage of the Act a virtual nullity.[81]

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[16] The court acknowledges that "[s]ection 2(11) does, however, state that it is applicable to an 'individual' who possesses the enumeration indicia of supervision" and that "if read literally the statutory definition can be construed not to cover full-time faculty" (App. A, *infra*, 29a-30a). It nonetheless concludes that the "Board's interpretation is not the only reasonable reading of the language of section 2(11)" (*id.*), and rejects and substitutes its own judgment for that of the Board in another "reasonable reading" of the statute.

[17] The Act, however, specifically includes under its coverage the subordinate professional employee who works "under the supervision of [another] professional. . . ." Section 12(b) of the Act, 29 U.S.C. 152(b).

[18] The meaning of the court's decision makes the Board's common inquiry into the ratio of supervisory to non-supervisory employees in a bargaining unit determination meaningless. See *Monarch Federal Savings & Loan*, 237 N.L.R.B. No. 116 (1978); *Brattleboro Memorial Hospital*, 226 N.L.R.B. 1036 (1976); *Russel S. Kribs Assoc., Inc.*, 181 N.L.R.B. 1109 (1970). The University argued before the lower court in its brief and at oral argument against the Board's inclusion of department chairmen in the bargaining unit precisely on the grounds of the "incredibility" of the "high supervisory ratios" which would result from their inclusion. Univ. Brief at 4, 44-45.

The line between the faculty body and the University administration is virtually obliterated by the court. Although the court concludes that "the University has accepted [faculty determinations affecting the essence of the University's educational venture] without hesitation so consistently" (App. A, *infra*, 36a), it never denies or controverts the processes in University goverance which require virtually every academic and personnel action to be reviewed, approved and ultimately implemented by the administration. Inherent in these processes is the separation between the faculty body and the supervisors and managers of the University. As set forth in the following sections of this Petition, the issue, as articulated by the court, turns on a determination as to what extent (as well as in what respects) faculty decisions or authority are effectively determinative of the policy of the University. On this issue the lower court first fails to distinguish areas of professional, academic interest from managerial policy;[19] and second, usurps the fact-finding role of the Board, as applied to the record in the representation proceeding.[20]

The ruling of the court is the first and only decision to so construe the role of faculty. Although the Board has since 1971 in *C. W. Post Center of Long Island University*, 189 N.L.R.B. 904, articulated and applied standards similar to those applied by it here to the unique nature of the college community and the relationship between the faculty body and administration, the court here applied Board law and policy to reach a contrary conclusion. The First Circuit Court of Appeals showed a greater deference to the expertise and experience of the Board, when it approvingly construed Board standards as applied to department chairmen at Boston

[19] See pp. 30-32, *infra*.

[20] See pp. 32-42, *infra*.

University and found them to be neither supervisory nor managerial employees:

> "This court first faced the significant questions which arise from the assertion of jurisdiction over post secondary institutions in *NLRB* v. *Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975). In that case, we considered and answered in the affirmative . . . whether the institution's faculty were employees within the meaning of section 2(3), rather than supervisor's under section 2(11), 29 U.S.C. § 152(3) and (11).
>
> "In considering this major policy change by the Board, we recognized that: The declared purpose of the Act is to eliminate obstructions upon commerce caused by labor unrest * * * and in dealing with employer operations whose effect upon commerce has grown over time the Board believes that it is endowed with discretion to exercise a fuller measure of its conferred jurisdiction. *Id.* at 554 . . .
>
> "Since the Board's first entry into the field of higher education, the exposure of the nation's universities to organizational efforts has grown rapidly, and the role of the Board in the University setting has engendered a great deal of comment and criticism. Much has been made by the Board's critics of the special governance structure in universities and the general inapplicability of its rules developed for private industry to the academic community, and the University here has, quite understandably, seized on this general criticism to support its case . . . But we must also note that the Board's transfer of its private industry experience and rules to the university setting was only natural and is consistent with the common

law method of applying time-tested legal principles to new situations." *Boston University, supra,* 575 F.2d 301, 304-05 (1st Cir. 1978) (citations omitted).

d. After the court noted that "none of the criteria applied by the Board," discussed above, "has any particular appeal," it found the additional criterion that faculty remain subject to the ultimate authority of the Board of Trustees to be "particularly unconvincing" (App. A, *infra,* 37a). Where the Board has applied this ground for the denial of supervisory or managerial status to faculty, however, it has never been applied disjunctively.[21] It has rather been considered in conjunction with an analysis of (i) the status of faculty as professional employees; (ii) the interest in whose behalf they exercise their authority; and (iii) the degree of collectivization by which that authority is exercised.[22]

This criterion of the Board has accordingly been applied in faculty unit determinations with the other criteria for the purpose of applying the Act and Board policy to the status of university faculty who act with the independence and discretion concomitant to their professional standing in a unique, collegial mode. The court characterized this uniqueness by noting that "most university faculties enjoy a state of independence and influence on policy which is 'entirely unknown among the professionals in private industry'" (App. A, *infra,* 28a). But the court again failed to consider the nature of the influence which faculty exercise and how that influence is wielded in the collegial context.

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[21] *University of Miami, supra; New York Univ.,* 205 N.L.R.B. 4 (1973); *Adelphi Univ., supra; C. W. Post Center of Long Island Univ., supra.*

[22] See fn. 8, *supra.*

While management may assign a problem to an engineer or lawyer whom it employs, it hardly can dictate the solution he finds. The extent to which management utilizes that solution may often depend on the competence of the professional and the job he did in arriving at and recommending that solution. The fact that management may ultimately use or implement and then profit from that solution does not render its creator a supervisor or manager; it reflects, rather, on the competence of the employee in fulfilling the professional mission delegated to him.

Analagously, the faculty, individually *and* collectively, are delegated responsibility for the development of curriculum and academic standards and, to a limited extent, evaluation of the professional merits of other faculty. Faculty fulfillment of these delegated responsibilities may, in fact, advance the best interests of the educational venture. But the fact that faculty recommendations in these areas may often be adopted by management is not reflective of their managerial or supervisory authority, but rather of the professional competence of the individual faculty member or the faculty of a department or school.

The dynamic between the advisory and consultative role of the faculty and the ultimate authority of the University trustees is central to the Board's rationale in faculty bargaining unit determinations. From the ultimate authority of the trustees, the faculty's professional responsibilities are delegated. But the failure of individual faculty members to meet those responsibilities satisfactorily will affect their continued employment, as the administration will ultimately determine for the trustees. The failure of collective faculty bodies to meet the same may give rise to the reorganization of that body,[23] or the administration's re-

[23] Thus the University administration shifted the Math and Science Education Department of the Belfer School to the Ferkauf School without even consultation with the faculty (Union Exh. 106).

moval of a department chairman,[24] or the appointment of new managerial or supervisory personnel to deal with the shortcomings of the faculty.

The ultimate authority of the University Board of Trustees, as delegated to and implemented by the administration, is a real part of the governance of the institution *and* its faculty. Where faculty recommendations become University policy, they are processed through faculty committees, then considered by deans and directors, then reviewed between the deans and Vice-Presidents, and ultimately reviewed and acted upon by the President for the Board of Trustees. Throughout this process, the power of veto by administration officers and deans over virtually all aspects of faculty action is known at the University as more than a mere potential.

The Board's consideration of the ultimacy of the trustees' authority is proper and relevant in the University context. It distinguishes the standing of the faculty in a community of scholars from the interest of the University management in regulating the professional decisions of the faculty insofar as they impact on the prerogatives traditionally reserved to managerial authority.

2. The lower court failed to apply the standard of substantiality of the evidence in its review of the factual findings of the Board and reached its conclusion despite the substantial evidence on the record in support of the findings of the Board. The court did not defer to the ex-

[24] At one school, the administration removed a department chairman who was *elected* by the faculty of the department (A. 823).

pertise and fact-finding role of the Board, but imposed its judgment over that of the Board in the finding of facts on which it based its determinations of law. The court erred in reaching its conclusions on the record here, and erred specifically as to the interpretation and application of certain material evidence.

In *N.L.R.B.* v. *Pacific Grinding Wheel Co., Inc.*, 572 F.2d 1343, 1347 (9th Cir. 1978), the court "commence[d] by reciting the usual litany" relevant to its scope of review of a Board determination on unfair labor practice charges, like those here at issue, under section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5):

> "Our power to review the factual findings of the NLRB is limited, for such findings are conclusive if supported by substantial evidence on the record considered as a whole. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951). Thus, if there is evidence to support each of two conflicting views, the findings of the Board must be allowed to stand despite the fact that we might have reached the opposite conclusion on our own. *NLRB* v. *Walton Manufacturing Co.*, 369 U.S. 404, 82 S.Ct. 853, 7 L.Ed.2d 829 (1962); *Universal Camera Corp.* v. *NLRB, supra.*"

Precisely on point with the scope of the lower court's review of the Board's determination here at issue, the First Circuit Court of Appeals in *Boston University, supra*, 575 F.2d 301, 305, discussed the standards of judicial review of a Board determination as to supervisory or managerial status:[25]

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[25] "Keeping in mind the substantial evidence test," the court said, its review of the record upheld the Board determination that faculty department chairpersons do not exercise supervisory authority (and their exercise of supervisory authority over non-unit personnel was insufficient to render them supervisors). *Id.*

> "The question of who are supervisors or managerial employees is one of fact for the Board, *Stop & Shop Companies, Inc.* v. *NLRB*, 548 F.2d 17, 18 (1st Cir. 1977); *NLRB* v. *Magnesium Casting Co.*, 427 F.2d 114, 117 (1st Cir. 1970), *aff'd*, 401 U.S. 137, 91 S.Ct. 599, 27 L.Ed.2d 737 (1971), and the expertise of the Board in dealing with the gradations of authority between "supervisors" and "employees" can be so subtle that determining who is a supervisor must "as a practical matter" involve "a large measure of informed discretion." *NLRB* v. *Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961)."

The lower court here concluded that the Board rendered its decision "without any analysis" and merely relied on doctrines promulgated in earlier Board decisions (App. A, *supra*, 24a). But the Board, and its hearing officer, had before them evidence accumulated over twenty-one days of hearings, including over 4600 pages of testimony and 200 exhibits.

There is no intention here to argue that the Board's determination on the record is incontrovertible, but rather that the Board rendered its decision on substantial evidence; and that the court failed to look to the substantiality of the evidence, but instead superimposed its judgment on the weight and balance of the evidence over that of the Board. In this respect, the lower court erred.

Certain of the court's characterizations of the facts are relevant to review here in light of the deference owed to the Board in dealing with these "gradations of authority between 'supervisors' and 'employees.'" The following text

lists only some examples of the court's findings of fact, viewed against a deeper analysis of the record:

> (i) "Dean Mirsky [of Stern College] has never made a faculty appointment which was not approved by a department chairman." (App. A, *infra*, 9a).
>
> The record shows, however, that the Dean takes the responsibility for the interviewing of all candidates after he has received authorization from higher administration officers for the filling of the vacancy (A. 313, 315). He has then overruled the faculty in decisions affecting non-renewal (A. 388).
>
> (ii) "The University President has granted the great majority of recommended promotions and has never overruled a negative recommendation [from the faculty at Stern College]." (App. A, *infra*, 9a).
>
> The Dean at Stern College testified, however, that recommendations on promotions from the faculty will be "generally approved," but both negative and positive recommendations are referred to the Academic Vice President and President for independent review (A. 92, 330, 443). The President has nonetheless exercised his prerogative to freeze all faculty promotions, notwithstanding then pending recommendations (A. 1633).
>
> (iii) "[At Yeshiva College] senior professors screen applicants for faculty positions. [The dean] and the senior professor then jointly make the hiring decisions with [the dean] *generally* accepting the recommendations of the senior professor." (App. A, *infra*, 10a). (Emphasis added).
>
> The record reflects, however, that the dean refers senior professors' recommendations to the President

only after his independent review of the applicant's qualifications (A. 452). The dean noted that not all senior professors take this role seriously and some perform only perfunctorily, leaving the major burden to him (A. 455).

(iv) "[At the Belfer School], the hiring of faculty members and the length of their appointments are determined by a majority vote of the department. Dean Komar testified that his only role in hiring is his participation in the discussion and voting on applicants to his department. Decisions on promotion, tenure and non-renewal of faculty appointments are also made within each department by consensus. Komar stated that he does not believe he has the right to overrule such departmental decisions." (App. A, *infra,* 14a).

The Dean testified, however, that he has not referred all department recommendations in these areas to the President (A. 892), as the Faculty Constitution at the School allows him the *authority* to disapprove such recommendations (A. 893; U. Exh. 131). In any event, the President has *not* granted all promotion recommendations from the School's departments (A. 1333).

(v) "The Promotions Committee effectively determines questions of faculty promotions [at the Ferkauf School]." (App. A, *infra,* 15a).

The dean, however, sits on this Committee and has refused to act on recommendations from the Committee, thereby precluding promotions which require referral by the dean and action by the President (Tr. 4044).

(vi) "The [Faculty Review] Committee has jurisdiction to review faculty grievances, particularly those concerning promotion and tenure . . . and is authorized to recommend action to the President." (App. A, *infra*, 17a).

The record, however, refers to the facts of a single case before this Committee, where it concluded it had no authority to bring about the rehiring of a non-renewed faculty member. Its sole recourse, the Committee reported, was to refer the matter to the President "in whom ultimate responsibility rests. . . . He alone makes the crucial decision." (A. 1557).

(vii) "The purpose of the [Academic Priorities and Resource Allocation] Committee is to provide a long-range scale of academic and fiscal priorities at Yeshiva . . . [and it] is empowered to reevaluate the objectives of the schools of the University. . . . It should be noted, however, that this committee at the time of the hearings had met only twice and had not focused upon particular problems nor made any specific recommendations." (App. A, *infra*, 17a-18a).

This Committee was formed during the organization of the union and is composed of every dean and director and virtually every University officer and administrator except the President, as well as faculty representatives elected by their colleagues (A. 1518; Univ. Exh. 48). The University witness testified that to date the faculty do not know what this Committee is about (A. 596), and it has taken no substantive action and has not even determined its purposes (A. 596, 598).

The foregoing analysis is not intended to be exhaustive. At best, it is exemplary of the shading, nuances and different

lights which the evidence may shed on the issue of the faculty's status. But the court not only erred in its review of the facts and in its virtually *de novo* analysis and findings, it also omitted reference to and reliance upon other crucial facts in this record. References to only a few examples may suffice in further support of the substantiality of the evidence on which the Board acted, and the failure of the court to apply that standard to its review:

(i) The President has denied a faculty resolution on retirement age (A. 1287).

(ii) The President has rejected an amended by-law for the Yeshiva College faculty, as proposed and passed by the Yeshiva College faculty (A. 1269).

(ii) Deans will deny recommendations on department expense budgets from senior faculty or department chairmen (Tr. 2430).

(iv) The Registrar and other administrative officers have denied faculty recommendations regarding academic standards and transfer credits (A. 690).

(v) At the Belfer Graduate School, the dean has denied approval to the appointment of an *elected* department chairman (A. 823).

(vi) The dean at the Belfer School denied a request of the Library Committee to meet with administration officers over the contemplated move of the Belfer Library (Tr. 3341; U. Exh. 105).

(vii) The Belfer Faculty Committee formally protested "the failure to consult with the faculty on matters of concern to it," with specific reference to the dean's refusal to convene the Academic Credentials Committee and Faculty Committee to pass on

qualifications of new appointees to the faculty (Tr. 4289; Union Exh. 117).

(viii) The Belfer faculty's election of a faculty representative to the University committee to plan the formation of faculty senate was unilaterally vetoed by the dean (A. 1306).

(ix) The dean at the Ferkauf School has denied a tenure recommendation approved by the entire body of tenured faculty at the School (A. 1189).

(x) The dean at the Ferkauf School has also vetoed faculty sabbatical requests (A. 1234).

(xi) The dean at the Werzweiler School has denied a faculty committee recommendation for a new appointee and made an offer to a candidate of his own choosing (Tr. 3553, 3584).

(xii) The dean at the Werzweiler School has denied faculty recommendations for the formulation and structure of a Committee on Academic Appointments, seeing the proposal as too "tight on the dean's collar." (A. 1001-02; Tr. 3568-73).

Undoubtedly the University can point to corresponding incidents and practices where faculty recommendations, requests and demands have been met by the administration, as well as virtual practices whereby faculty opinion has gained general acceptance. But the picture here is not one where there is not communication between faculty and administration, nor where faculty judgment is disowned as either valueless or conflicting with the best interests of the University. Instead, the University maintains its discretion—in terms of unilateral and ultimate authority—to give what weight and import to collective faculty input as it

may choose and deem consistent with its prerogatives and goals.

That analysis was properly made by the Board on the basis of the extensive record before it. Surely this court cannot and should not undertake an analysis of the evidence, *except* to the extent that the underlying record here amply and aptly supports the determination of the Board. The propensity of the lower court to go further into the mass of the record was not only beyond its appropriate scope of review, but also caused it to err in its analysis. It not only overlooked evidence in opposition to its conclusions of fact, but it misconstrued other evidence.

In a separate section of its fact-finding, the court analyzes and apparently relies upon the authority of the faculty at the Teacher's Institute for Women ("TIW") (App. A, *infra*, at 12a), where the University initially contended that four full-time and ten part-time faculty are employed. The court cites in this section the faculty's rejection of a proposal to move the School, and later in its conclusions of law refers to the same again (*id.* at 23a). The court also cites the Director of TIW as remarking: "The faculty is the School." (*id.* at 34a).

The court failed, however, to note that the Board made specific findings with respect to the faculty at TIW:

> "The record indicates that there are currently no faculty members at [TIW] holding full-time appointments with the University; rather the faculty listed by [TIW] as teaching a full 12-hour load are, in fact, part-time faculty without University appointment. Accordingly, such faculty are not eligible to vote in the election." App. D, *infra*, 69a, n. 9.[26]

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[26] The Board noted also: "At the close of the hearing, the Petitioner indicated that it did not seek to represent faculty at [TIW]" insofar as they do not hold full-time faculty appointments, but are part-time faculty. App. D, *infra*, 66a, n. 3.

The court quite clearly weighed and relied on evidence of the role of the faculty at TIW, although the Union did not seek to represent these faculty and the Board found them to be excluded from the bargaining unit. The court surely did not find the Board's determination in this respect in error, since the question of the status of these faculty arose over the credibility of a University witness.[27] Since the court did not even address the issue of the inclusion of these faculty in the bargaining unit (and thereby overrule the Board's determination in this respect), the inference must follow that it overlooked the Board's footnoted exclusion of these faculty and the testimony of their director.

Speculation as to the relevance of the court's reliance on these facts is futile. But the court's failure to defer to the Board's fact-finding and expertise in defining and interpreting gradation of authority has caused its decision to go far beyond a determination as to whether there was substantial evidence on which the Board rendered its deter-

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[27] The sole witness on the question of the status of faculty at TIW was its director. In response to a question as to the nature of his job, *he referred to his notes* and responded: "I consider myself as the executive arm of the faculty." (A. 758). The phrase happened to be identical to the self-description of the dean of James Striar School (A. 688) and the dean of Erna Michael College (A. 575), who had testified on the immediate hearing dates prior. The Hearing Officer granted a *voir dire* with respect to the notes held by the witness, who initially refused to turn them over (A. 759). In the *voir dire*, he testified that his self-descriptive phrase merely came from his "flare for English" (A. 762) and then ripped up the notes. The notes, pieced together, contained only the following markings: "faculty makes decisions and I carry them out"—"job security, subject job security, tenure" (A. 761). The witness "did not know" whether his faculty participated in the retirement plan for full-time faculty of the University, and after University counsel offered to submit proof on that issue, he failed to do so (Tr. 3064-65). Counsel did acknowledge that the faculty at TIW "may lack full-time faculty appointments in its formal sense" (A. 726).

mination. The court instead judged the evidence anew and rendered an independent decision on its judgment of that evidence. The court erred both in the scope of its review and in the findings and conclusions it drew therefrom.

Conclusion

The decision of the court has not only deprived the 209 full-time faculty at Yeshiva University of representation under the Act, but promises, in a holding abberational from all other Board decisions in higher education and in conflict with the decision of the First Circuit Court of Appeals in *Boston University supra*, to make uncertain and potentially to deprive all other faculty in private higher education (as well as other comparable professional employees) of coverage under the Act. The court's application of the Act and interpretation of national labor policy, as applied to the facts before the Board, are in error.

For the reasons set forth herein, a writ of certiorari should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 852—September Term, 1977

(Argued April 26, 1978 Decided July 31, 1978)

Docket No. 77-4182

NATIONAL LABOR RELATIONS BOARD, PETITIONER

—against—

YESHIVA UNIVERSITY, RESPONDENT

—and—

YESHIVA UNIVERSITY FACULTY ASSOCIATION,
INTERVENOR

Before:

LUMBARD, MULLIGAN and TIMBERS,
Circuit Judges.

MULLIGAN, *Circuit Judge*:

The National Labor Relations Board (the Board) has applied for enforcement of its order of August 24, 1977, reported at 231 NLRB No. 98, requiring respondent Yeshiva University (Yeshiva) to recog-

nize the Yeshiva University Faculty Association (the Union) as the exclusive bargaining agent of a unit of Yeshiva's full-time faculty members. The petition for enforcement of the Board's order is denied.

I

On October 30, 1974 the Union filed a petition under § 9(e) of the National Labor Relations Act (the Act), as amended, 29 U.S.C. § 159, for certification of a bargaining unit consisting of full-time faculty at Yeshiva University.[1] In opposition Yeshiva contended that all its faculty members are managerial or supervisory personnel and hence not em-

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[1] The Union did not seek to include within the proposed unit the faculty of several schools and affiliates of the University: the Albert Einstein College of Medicine, the Sue Golding Graduate School of Medical Sciences, Yeshiva High School, the Benjamin Cardozo School of Law, and several theological and community programs. The University did not contest the exclusion from the unit of these faculty members. Accordingly, the above divisions of Yeshiva are not here involved and all references to Yeshiva University exclude these schools and programs.

Other faculty excluded from the unit sought by the Union and approved by the Board were part-time faculty; lecturers; Deans, acting deans and Directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and supervisors as defined in the Act.

ployees within the meaning of the Act. Alternatively, the University sought a unit consisting of all full-time and regular part-time faculty with certain exclusions for managerial or supervisory personnel. Between November 26, 1974 and May 6, 1975 hearings were conducted before a Board-appointed hearing officer. On December 5, 1975 the Board issued its decision and direction of election, reported at 221 N.L.R.B. 1053.

The Board found that the Union was a labor organization within the meaning of the Act and that University faculty were professional employees and not managerial or supervisory personnel. The Board further found that department chairmen, assistant deans, and faculty members of certain committees with University-wide jurisdiction were neither managerial nor supervisory personnel. The Board concluded that a unit of full-time faculty was an appropriate bargaining unit.[2]

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[2] The unit approved by the Board included full-time faculty with the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting faculty member with such rank, department chairmen, division chairmen, senior faculty and assistant deans. The Board also found that "terminal" faculty members, i.e., those who at the date of the election had received notice of termination or non-renewal of appointment, had reached the mandatory retirement age or had given notice of intention to resign, were eligible to vote if still employed at the date of the election.

Thus the unit sought by the Union was found appropriate with one minor exception: faculty members administering grants under awards by Government or private agencies were excluded from the unit as supervisors under the Act.

In the election held pursuant to the Board's direction between December 16 and 20, 1976 the Union won by a substantial margain. On December 29, 1976 the Union was certified as the exclusive bargaining representative of the employees in the unit.

Yeshiva, however, refused to bargain with the Union and on February 2, 1977, the Board issued a complaint against the University under charges filed by the Union. Yeshiva opposed the complaint and a subsequent motion for summary judgment, again raising objections to the propriety of the NLRB's unit determination.

The University's position was rejected by the Board, which found Yeshiva to be acting in violation of §§ 8(a)(5) and (a)(1) of the Act, as amended, 29 U.S.C. §§ 158(a)(5), (a)(1). The Board granted summary judgment against Yeshiva and ordered the respondent to bargain collectively with the Union. This proceeding was commenced by the Board on October 17, 1977 following Yeshiva's continued refusal to comply with its decision and order.

On this appeal, Yeshiva argues principally, as it did before the Board, that the full-time faculty of the University are managerial and/or supervisory employees within the meaning of the Act and are therefore excluded from the Act's coverage. Yeshiva also urges that two assistant deans and faculty who are departmental or divisional chairmen, or who are members of certain committees on University affairs, exercise additional authority which mandates their

classification as supervisors and/or managers.[3] Before examining these contentions it is necessary to review the structure of Yeshiva and the role played by the faculty in the operation and governance of the University.

II

Yeshiva University is a private institution of higher education chartered under the laws of the State of New York. Its offices and educational facilities are located on four widely separated campuses in New York City. We are here concerned with Yeshiva's six undergraduate colleges and programs,[4] and four graduate schools.[5] Approximately 2,500 full and part-time students are enrolled at Yeshiva. The University is staffed by 209 full-time and 150 part-time faculty members.[6]

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[3] Yeshiva also argues that the Board abused its discretion by excluding part-time faculty from the unit, and permitting terminal faculty members to vote in the election.

[4] The undergraduate units of Yeshiva are Yeshiva College, Stern Collerge for Women, The Teacher's Institute for Women, The Erna Michael College of Hebraic Studies (Erna Michael College), James Striar School of General Jewish Studies (James Striar School) and the Yeshiva Program.

[5] The graduate schools are: Bernard Revel Graduate School, and its summer division, Harry Fischel School of Higher Jewish Studies (Bernard Revel School), Wurzweiler School of Social Work (Wurzweiler School), Ferkauf Graduate School of Humanities and Social Sciences (Ferkauf Graduate School) and Belfer Graduate School of Sciences (Belfer Graduate School).

[6] Below is a numerical breakdown of the faculty members at Yeshiva's ten schools and programs:

[Footnote continued on page 6a]

Yeshiva has a self-perpetuating Board of Trustees with no administrative position at the school apart from their membership on the Board. The University's chief executive officer is the President. There are, in addition, three vice-presidents at Yeshiva (for student affairs, business affairs, academic affairs) as well as a Bursar, Registrar, Director of Admissions and several University deans. An Executive Council of deans and administrators makes recommendations to the President with respect to various matters. Two other committees, the Coun-

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[6] [Continued]

UNDERGRADUATE SCHOOLS

	Full-Time Faculty	Part-Time Faculty
Yeshiva College	47	42
Stern College	38	33
Teacher's Institute for Women	4	7
Jewish Studies Programs		
James Striar School	6	8
Erna Michael College	13	8
Yeshiva Program	10	2
Undergraduate School Subtotals:	118	100

GRADUATE SCHOOLS

Belfer Graduate School	38	3
Ferkauf Graduate School	32	23
Wurzweiler Graduate School	18	14
Bernard Revel Graduate School	3	10
Graduate School Subtotals:	91	50
TOTALS:	209	150

cil of Graduate Schools and the Council of Undergraduate Schools advise the President and Board regarding inter-divisional programs designed to increase coordination and cooperation among the schools and divisions of the University. These councils consist of elected student and faculty representatives from each school or division, the dean or director of each academic unit and members of the University administration, including the President. A Faculty Handbook sets forth University policies regarding faculty appointments, promotion, tenure, termination and sabbaticals.

Each of the schools or divisions is headed by a dean or director. Most of the schools have a faculty assembly or student-faculty senate as well as a committee structure, including, *inter alia*, a curriculum committee, a standards committee, and a welfare committee. The faculty of each school meet periodically and at Stern College, Yeshiva College, and the Belfer and Ferkauf Graduate Schools the faculties meet and conduct their affairs according to written by-laws and/or constitutions which have been approved by the President. Only two of the schools, Yeshiva College and the Belfer Graduate School, have assistant deans. These two assistant deans are teaching faculty members.

Each school, college and program at Yeshiva enjoys great autonomy in determining its own curriculum, grading system, and academic standards as well as in a wide variety of other matters. Therefore the role of the faculty at Yeshiva can best be ap-

preciated by a review of the individual academic units of the University.

1. *Stern College for Women*

At Stern College a Committee on Academic Standards, composed of the Dean of the College, Dean Mirsky, who retains his faculty rank, and six full-time faculty, fixes the academic requirements and decides whether a student whose performance is inadequate will be required to leave the school. Although Dean Mirsky recognizes that the decision to dismiss a student results in a loss of tuition income, he has never overruled the Committee. Similar committees composed predominantly of faculty members establish admission standards, determine graduation requirements, and set up grading systems. Upon the recommendation of a scheduling committee the faculty introduced a new scheduling model for the school. In response to growing budgetary limitations, a faculty committee on personnel and budget has made generally effective recommendations concerning elimination of elective courses, the establishment of joint courses, and other scheduling changes. In the 1969-70 academic year the Stern College faculty disagreed with a decision by Dean Mirsky and the Curriculum Committee to delete Stern's education major; Mirsky reinstituted the major. Indeed, a faculty dominated curriculum committee must pass on all program changes or changes in graduation requirements.

Department chairmen call to Mirsky's attention the need for new faculty members. Interviewing is done

by the chairman and the Dean who then agree on an appointment. Dean Mirsky has never made a faculty appointment which was not approved by a department chairman. Similarly effective recommendations are made by department chairmen regarding termination of faculty members. Mirsky has only once disagreed with a department chairman with respect to a termination.

Promotion recommendations are solicited from department chairmen by a faculty Promotions Committee. The committee passes on its recommendation to Mirsky who has always accepted the committee's decisions. The University President has granted the great majority of recommended promotions and has never overruled a negative recommendation.

Tenure recommendations are made both by Mirsky and the candidate's department chairman to the University President. All negative tenure recommendations by chairmen have been accepted both by Mirsky and by the administration. In only one instance has Mirsky disagreed with a chairman's positive tenure recommendation. Nevertheless, tenure was granted on that occasion.

2. *Yeshiva College*

At Yeshiva College a College Senate composed of faculty, administrators, students and alumni members has jurisdiction over admissions policy, scholastic standards, the grading system and other academic policy matters. All measures passed by the Senate are subject to veto by the Faculty Assembly. The

Dean of the College, Dean Bacon, who is also a professor of linguistics, testified that he feels compelled to see that decisions of the Senate and Assembly are executed. Moreover, not once in Bacon's sixteen years as Dean has the University President veoted an action by either body. Bacon is aided by an assistant dean who teaches one course per semester.

Yeshiva College is divided into "subject areas" which are the equivalent of departments in other schools. The counterpart of the department chairman at Yeshiva College is the senior professor in the subject area. Subject areas are grouped into four broad divisions. One senior professor in each division serves as a "divisional chairman."

The divisional chairmen comprise the Advisory Council on Promotions. Recommendations on promotions by the Council have always been followed by the President of the University, although such recommendations have, at times, been in conflict with those made by Dean Bacon.

Senior professors screen applicants for faculty positions. Dean Bacon and the senior professor then jointly make the hiring decisions with Bacon generally accepting the recommendations of the senior professor. Indeed, the Dean has never appointed a faculty member over the objection of a senior professor and once sustained a senior professor's objection over the appointment desired by a University Vice-President for Academic Affairs. Dean Bacon has given equal deference to the recommendations of senior professors regarding termination and re-

appointment of probationary faculty. Finally, senior professors largely determine the budget of their subject area. The budget requests of the senior professors receive perfunctory approval by Bacon "99 percent" of the time and, during Bacon's tenure had never been rejected by the University administration.

3. *Erna Michael College*

At Erna Michael College, admissions procedure, curricular matters, grading, scheduling and other questions of academic policy are subjects on which the faculty, through the faculty meeting, governs. The faculty has also implemented a basic restructuring of the College in which the number of academic hours required of students was substantially reduced. As a result, faculty at the College now teach fewer hours and teach a minimum of only three rather than four days per week. Dean Rabinowitz of Erna Michael testified that he felt bound to institute even those faculty decisions with which he disagreed, such as the establishment of trimester academic calendar. Neither Dean Rabinowitz nor any other member of the administration has ever vetoed a decision of the faculty on such issues.

Evaluation of faculty to determine whether retention or salary increase is warranted is often carried out at a meeting of faculty in the affected member's academic subject area and is led by the senior professor who, as at Yeshiva College, is the equivalent of a department chairman. At other times such evaluations are simply made by the senior professor.

The role of the senior professors at Erna Michael regarding promotion and termination of faculty is very similar to that at Yeshiva College.

4. *The Teacher's Institute for Women*

The Director of the Teacher's Institute, Rabbi Faivelson, testified that the faculty had made effective recommendations regarding curriculum, admissions policy and degree requirements.

When the need for a new faculty member arises Rabbi Faivelson asks the faculty[1] whether they have any objections to the applicants. Faivelson stated that if any faculty member has the slightest objection the applicant is not hired. On an occasion where Faivelson favored termination of a faculty member for budgetary reasons the faculty voted against the termination and the faculty member was retained.

Rabbi Faivelson once recommended that the Institute move to Brooklyn to attract better students. The faculty rejected the proposal and determined that the school would remain in Manhattan.

5. *James Striar School*

Director of James Striar, Rabbi Besdin, who carries a full-time teaching load, testified that faculty meetings are "in a great sense decisive as to the direction of the school." The faculty at James Striar have considered at their meetings administrative

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[1] There are no faculty ranks at the Institute. Thus, there are no department chairmen or senior professors.

regulations, curriculum matters, and course offerings. Rabbi Besdin testified that he did not recall ever overruling a direct recommendation of the faculty. Indeed, he stated that on one occasion a majority of the faculty rejected his recommendation to retain a student guidance procedure, thereby "overruling" Besdin on the issue.

Part-time faculty hiring decisions are made by Besdin and the affected department chairman. Besdin has never hired a full-time faculty member without consulting the concerned department head.

6. *The Yeshiva Program*

Rabbi Charlop is the Director of the Yeshiva Program, which provides a course of study in Talmudic texts. There are no traditional faculty ranks at the Yeshiva Program. Rabbi Charlop testified that decisions affecting academic matters are made by a consensus of the faculty. In one instance the faculty decided to extend the academic calendar by two weeks and this decision was implemented.

7. *Belfer Graduate School*

Arthur Komar became Belfer's Dean in 1968 after the school's faculty successfully petitioned the President of the University for the removal of Komar's predecessor. Thereafter, Komar was elected Acting Dean by the faculty and he obtained a vote of approval from the faculty before accepting a permanent appointment as Dean. Komar, who was teaching one course at Belfer when he testified, stated that he

viewed his position as Dean as "first among equals." Komar's assistant dean is a tenured assistant professor who teaches one course each semester.

At Belfer a Faculty Council deals with curricular problems, size of departments and formation of new departments. It has even discussed the financial and wage policies of the school. The majority of the key decisions in the governance of Belfer, however, are made by the school's departments. The hiring of faculty members and the length of their appointments are determined by a majority vote of the department. Dean Komar testified that his only role in hiring is his participation—like any other faculty member—in the discusison and voting on applicants to his department. Decisions on promotion, tenure and nonrenewal of faculty appointments are also made within each department by consensus. Komar stated that he does not believe he has the right to override such departmental decisions. Salary negotiations with new faculty are arrived at not by Komar but by department chairmen. The chairman's recommendations for salary figures are generally accepted by the Dean.

8. *Ferkauf Graduate School*

As at Belfer, faculty hiring decisions at Ferkauf are effectively made by consensus of the department. The Dean of Ferkauf, Dean Gittler, last taught a course in the semester prior to his testimony. He stated that he accepts "98 percent" of faculty appointments recommended by the departments and the administration has never vetoed an appointment.

Rank of appointees (and thus their salary) is also decided by the department.

Many other aspects of the school's operation are resolved by faculty committees. The Promotions Committee effectively determines questions of faculty promotions. In fact, a promotion has never been made in the face of a negative committee decision and only once in the past nine years has a positive committee recommendation not resulted in the faculty member's promotion.

Tenure questions are handled by the Faculty Council on Tenure. Neither Dean Gittler nor the administration has ever reversed a negative tenure decision of the Council. Only once has a positive recommendation not resulted in a grant of tenure.

Department chairmen at Ferkauf wield substantial budgetary power through the Chairmen's Council. Until the budget cutbacks of the last few years every aspect of the budget was deliberated by the Council. Similarly, tuition increasse are never recommended by Dean Gittler unless the chairmen concur. Chairmen also establish, in consultation with their departments, the workload of the full-time faculty.

9. *Wurzweiler School*

The role of the faculty at Wurzweiler is very similar to that at Ferkauf. The acting Dean of Wurzweiler, Dr. Green, who retains his faculty rank and was teaching two courses at the time of the hearings, testified that the internal operation of the school is "heavily governed" by faculty decisions. In addi-

tion to wielding great power on academic matters, the faculty has made decisions with serious budgetary consequences. For example, when Dean Green proposed a $500 tuition increase the faculty disagreed and sought an increase of only $300. The faculty's position prevailed. The faculty also made a decision to increase the size of the student body at Wurzweiler.

Faculty committees play a prominent part in the running of Wurzweiler. One such committee monitors the school's community social work program to ensure compliance with the goals of the outside agency which funds the program. Thus the committee's oversight has an important effect on retention of the program's funds.

The hiring, promotions, termination and tenure policies of the school were in a transitional state at the time of the hearings. Hiring was currently conducted by an ad hoc faculty committee which made a selection from candidates submitted by the Dean, who accepted all committee recommendations. A personnel committee has drawn up guidelines for substantial expansion of the faculty's role in questions of promotion, termination and tenure. While these guidelines have not been fully enacted to date, Dean Green confirmed that except for a minor clause which was contrary to provisions of the University's Faculty Handbook, the Wurzweiler faculty had authority to promulgate such guidelines, which were then binding on the dean.

10. *Bernard Revel School*

At the time of the hearings Revel had no permanent Dean. Dr. Leo Landman, Secretary of the Faculty, was currently overseeing the day-to-day operation of the school as well as teaching two courses. Landman testified that decisions on curriculum, admissions requirements, degree requirements, and course offerings were made by consensus of the faculty. Landman further stated that the faculty's decisions were generally given effect.

According to Landman's uncontroverted testimony, department chairmen at Revel made effective recommendations regarding both full and part-time faculty hiring. In fact, chairmen's negative recommendations in this area had always been upheld.

* * * * *

Two other important organs of University-wide faculty governance should be mentioned. The Faculty Review Committee is composed of eight tenured faculty members who are elected from the various schools of the University. The Committee has jurisdiction to review faculty grievances, particularly those concerning promotion and tenure. If the grievance is not satisfactorily resolved after the Committee has notified the Dean of the interested school, the Committee is authorized to recommend action to the President. Faculty members, along with students and administrators, also sit on a recently formed Committee on Academic Priorities and Resource Allocation. The purpose of this Committee is to provide a long-range

scale of academic and fiscal priorities at Yeshiva. Hence, Dean Rabinowitz, a committee member, testified that the Committee is empowered to reevaluate the objectives of the schools of the University, and to review class size, staffing patterns, physical facilities, tuition levels and fund raising methods. It should be noted, however, that this committee at the time of the hearings had met only twice and had not focused upon particular problems nor made any specific recommendations.

III

The major issue raised in this case is whether the full-time faculty[8] of Yeshiva are supervisors within

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[8] While we need not resolve the question, we note that we agree with the Board that the part-time faculty is properly excluded from the unit because they play a significantly lesser role in the affairs of the University than the full-time faculty and there is a lack of mutuality of interests between the two groups. *Trustees of Boston University* v. *NLRB*, Dkt. 77-1143, slip op. at 14 (1st Cir. April 13, 1978); *Kendall College* v. *NLRB*, 570 F.2d 216 (7th Cir. 1978); *New York University*, 205 N.L.R.B. 4, 6-7 (1973). In view of our disposition we need not pass on Yeshiva's position that terminal faculty should have been excluded from the unit and two assistant deans included. Also academic is the University's argument that certain committee and department chairmen who exercise supervisory power over non-unit personnel must, on that account, be excluded as supervisors.

One apparent rationale for the Board's inclusion of these chairmen in the unit is its so-called 50 percent rule, established by the Board in *Adelphi University*, 195 N.L.R.B. 639 (1972), under which the Board does not denominate as supervisors those faculty members who supervise nonprofessionals less than 50 percent of the time. Recently, the First Circuit cited this doctrine to support inclusion of faculty chairmen

section 2(11) of the Act, 29 U.S.C. § 152(11), and/or managerial personnel within the Board's own definition as adopted by the courts, and therefore whether these faculty members are improperly included as employees in the bargaining unit.[9]

Section 2(11) defines a supervisor as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to

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in a bargaining unit in a case where the court found such supervisory duties occupied only 5 to 10 percent of the individuals' time. *Trustees of Boston University* v. *NLRB, supra,* slip op. at 10 n.4. The court withheld its view of the validity of this rule in situations involving significantly greater amounts of time spent in a supervisory role. This court has specifically declined to assess the "legal justification" for the 50 percent rule. *NLRB* v. *Mercy College,* 536 F.2d 544, 550 (2d Cir. 1976).

[9] Although the Board has, on a number of occasions, considered the question whether full-time faculty at a mature university are supervisors or managers under the Act, see cases cited in text at 4139, *infra,* no court of appeals has squarely determined the issue. In *NLRB* v. *Wentworth Institute,* 515 F.2d 550 (1st Cir. 1975) the First Circuit simply rejected the Institute's argument that *all* faculty at *all* institutions of higher learning must be excluded from the Act's coverage. Limiting itself to the institution at hand, the court found that at Wentworth there was "no evidence of an instance of significant faculty impact collectively or individually on policy or managerial matters." Id. at 557. In *Trustees of Boston University* v. *NLRB, supra,* the university argued that certain department chairmen were supervisors rather than that the entire faculty should have been deemed managerial or supervisory.

> adjust their grievances, or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well settled in the industrial context that possession of any one of the enumerated powers in section 2(11) or the power to effectively recommend with respect to any one of them is sufficient to satisfy the statutory definition of a supervisor.[10] E.g., *NLRB* v. *Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1177 (2d Cir. 1968); *NLRB* v. *Quincy Steel Casting Co., Inc.*, 200 F.2d 293 (1st Cir. 1952); *Ohio Power Co.* v. *NLRB*, 176 F.2d 385 (6th Cir.), cert. denied, 338 U.S. 899 (1949).

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[10] It should be noted, however, that the Board has been less rigorous in denominating individuals as supervisors in those cases in which the employees involved were professionals within the meaning of section 2(12) of the Act, 29 U.S.C. § 152(12). E.g., *General Dynamics Corp.*, 213 N.L.R.B. 851 (1974); *Adelphi University, supra*, at 644. In instances in which the professionals involved possessed only limited supervisory authority and exercised such authority only sporadically the courts have been willing to accept the Board's position. E.g., *Trustees of Boston University* v. *NLRB, supra*, at 10; *Westinghouse Electric Corp.*, 163 N.L.R.B. 723 (1967), enf'd, 424 F.2d 1151 (7th Cir.), cert. denied, 400 U.S. 831 (1970). This discrepancy in the Board's approach seemingly results from the tension between the exclusion from the Act of supervisors under section 2(11) and the inclusion of professional employees under section 2(12). M. Finkin, The Supervisory Status of Professional Employees, 45 Fordham L.Rev. 805, 807-828 (1977). However, we cannot accept this rationale in the instant case, where the supervisory and managerial authority of the faculty is so pervasive and consistently exercised.

Managerial employees are exempted from the coverage of the Act not by explicit statutory language but as a matter of Board policy and unanimous court approval. *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267, 285-89 (1974). Employees who fall within this category include " 'those who formulate, determine, and effectuate an employer's policies.' " *Retail Clerks International Association* v. *NLRB*, 366 F.2d 642, 645 (1966) (Burger, *J.*), cert. denied, 386 U.S. 1017 (1967). In *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc., supra*, the Supreme Court emphasized the mandatory nature of the exclusion of all employees found to be managerial.

> [T]he Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals all point unmistakably to the conclusion that "managerial employees" are not covered by the Act.

Id. at 289. The Court concluded that the Board " 'is not now free' to read a new and more restrictive meaning into the Act" by which certain managerial employees would be held to be within its coverage. Id.

The record, which has been set forth in some detail in Part II and which is not controverted by the Board, strongly supports the contention of Yeshiva that a full-time faculty, acting at times through committees or department chairmen,[11] and at other times

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[11] We do not dispute the Board's finding that when department chairmen at Yeshiva act on matters such as faculty ap-

as a body, exercises supervisory and managerial functions as defined by section 2(11) of the Act and within the Board's prior holdings as discussed in *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc.* We stress that our function is not to examine *in vacuo* the governance procedures of all four-year private institutions of learning described in the briefs of the *amici* universities as "mature" institutions of higher education. Many such institutions have apparently adopted a collegial decision making process in which the faculty plays a decisive role in the development of institutional policy. Given the great diversity in governance structure and allocation of power at such universities it is appropriate to address ourselves solely to the situation at the institution involved in this proceeding. *NLRB* v. *Wentworth Institute*, 515 F.2d 550, 556 (1st Cir. 1975). The record here discloses that in many instances the full-time faculty of the schools of Yeshiva without question effectively recommend the hiring, promotion, salary and tenure of the faculty of the University in a manner which can hardly be described as routine or clerical. They further perform managerial functions not only by their personnel decisions but by adopting the stand-

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pointments, tenure, salary increases and the like, they function "primarily as instruments of the faculty." See, e.g., *Trustees of Boston University* v. *NLRB, supra*, slip op. at 9; *New York University, supra; Fordham University*, 193 N.L.R.B. 134 (1971). Rather, this finding of the Board reinforces our belief that in a variety of ways the full-time faculty at Yeshiva wields supervisory and managerial power.

ards of admission, the curriculum, the grading system and the graduation requirements of their school. Moreover, in particular cases the hiring of deans, the physical location of a school, teaching loads, and even the tuition to be charged were controlled by the full-time faculty. Indeed, the ability of the full-time faculty effectively to recommend or even to exercise many of the enumerated powers of section 2(11) and to formulate and effectuate University policy is not really disputed here. The Board's decision of December 5, 1975 treated the issue summarily.

> We find from our examination of the record, however, that the role and authority of the faculty herein with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different from what they were in [previous Board decisions] wherein the same arguments were rejected. At Yeshiva University, faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than "in the interest of the employer," and final authority rests with the board of trustees. (Citations omitted).

221 N.L.R.B. 1053, 1054 (1975). The Board concluded that "the faculty members are professional employees under the Act who are entitled to vote for or against collective-bargaining representation" and that a unit of full-time teaching faculty members was appropriate.

Thus, without any analysis the Board found that Yeshiva's full-time faculty were neither supervisors nor managerial personnel simply by stating that the substantial authority of the faculty was wielded in their capacity as professionals and by invoking three doctrines promulgated in earlier Board rulings. Since we are unpersuaded that these four justifications for the Board's decision on this point withstand careful scrutiny, we will analyze them, *seriatim*, below.

A. *The Full-Time Faculty are Professional Employees.*

Under section 2(12) of the Act, 29 U.S.C. § 152 (12),[12] a professional employee is specifically in-

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[12] Section 2(12) of the Act defines a professional employee as

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

cluded within the Act's coverage despite the fact that in the performance of his work he must exercise consistent discretion and judgment. Yeshiva does not argue that its full-time faculty members are not professional within the statutory definition of that term. They are obviously engaged in work which is "predominately intellectual," requiring advanced knowledge in a field of learning, and they do not perform work which is "routine mental, manual, mechanical, or physical" in nature. However, the fact that employees are professional does not preclude them from also being categorized as supervisory or managerial employees ineligible for inclusion in a bargaining unit. See, e.g., *General Dynamics Corp.*, 213 N.L.R.B. 851, 860, 862, 863 (1974); *Westinghouse Electric Corp., supra*, at 726; *American Oil Co.*, 155 N.L.R.B. 46, 48, 49 (1965); *Puget Sound Power & Light Co.*, 117 N.L.R.B. 1825, 1827 (1957). Even in an educational setting, the Board in *University of Chicago Library*, 205 N.L.R.B. 220 (1973), en'd, 506 F.2d 1402 (7th Cir. 1974) and *Claremont Colleges*, 198 N.L.R.B. 811 (1972) excluded professional librarians from a unit of library employees because they supervised non-professionals. Hence, it has been established by the Board's own decisions that simply because individuals are professionals under section 2(12), that status *per se* does not preclude their classification as supervisory or managerial personnel.

Whether, as a matter of policy, faculty members of institutions of higher learning are advantaged or

disadvantaged by collective bargaining is an issue which has understandably created divergent views.[13] But the Board, like the court, is bound both by the Act and by prior judicial interpretations of it. Unquestionably, a university full-time faculty member has the authority to determine the content of his course, the method he employs in teaching it, and the evaluation of his students' academic performance. *New York University, supra*, at 5. These factors place such faculty members squarely within the language of section 2(12) and these attributes of professionalism should not characterize them as managerial or supervisory.

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[13] *Compare*, e.g., Kahn, The NLRB and Higher Education: The Failure of Policymaking Through Adjudication, 21 U.C.L.A. L.Rev. 63, 79-83 (1973) (hereinafter cited as Kahn); Kadish, The Theory of the Profession and Its Predicament, 58 A.A.U.P. Bull. 120, 122 (1972); and Brown, Collective Bargaining in Higher Education, 67 Mich. L.Rev. 1067, 1072 (1969), *with* The Carnegie Commission on Higher Education, Governance of Higher Education, A Report and Recommendation (1973); and Bloustein, A Chamber of Horrors!, in The Effects of Faculty Collective Bargaining on Higher Education 110 (R. Hewitt ed. 1973).

The Board acknowledges in its brief that the activities of the full-time faculty at Yeshiva might suggest managerial or supervisory status in other contexts, but not in the case of an institution of higher learning. The legal justification for a different standard for university faculty is not made clear. The Board does comment, however, that labor organizations currently administer collective bargaining agreements for faculty at over 500 colleges and universities across the country and, therefore, the Board's position comports with "widely shared recognition of the organizational rights of faculty."

However, the issue as we perceive it in this case involves not simply the professor's exercise of discretion in conducting the courses he is employed to teach. Rather, the issue here is the extensive control of Yeshiva's faculty over what courses are taught in the institution, who teaches them, the number of teaching hours required of the faculty, and the rank, salary, and tenure status of other faculty members. We are further concerned by the crucial role of the full-time faculty in determining other central policies of the institution including, *inter alia*, the curriculum, admissions and graduation requirements, tuition, and in one instance, even the situs of a school. When faculty members have such power—as the board indicates they do at Yeshiva—they no longer are simply exercising individual professional expertise. They are, in effect, substantially and pervasively operating the enterprise.

The Board relies in part on *General Dynamics Corp.*, *supra*, at 857-58, where it commented that a lawyer or a certified public accountant might well as a professional "cause a change in company direction or policy which is based upon his professional advice alone," and yet should not on that account be held a managerial employee. However, we cannot reasonably equate the input of professionals in a profit-making commercial enterprise, whose advice based on their "technical expertise," id., may influence management on occasion to implement policy changes,

with that of the full-time university faculty, which is here largely responsible for the conduct and direction of an institution of higher education. This is not the case of a company which hires an occasional scholar to guide it in making engineering, legal or accounting decisions which have an impact on its business; this is the "company of scholars" itself. It is well recognized that most university faculties enjoy a state of independence and influence on policy which is "entirely unknown among the professionals in private industry." Kahn, *supra*, at 68; accord, Sands, The Role of Collective Bargaining in Higher Education, 1971 Wis. L. Rev. 150, 157. As Mr. Justice Cardozo noted: "By practice and tradition the members of the faculty are masters not servants. . . . They have the independence appropriate to the company of scholars." *Hamburger* v. *Cornell University*, 240 N.Y. 328, 336-37, 148 N.E. 539, 541 (1925).

Thus, while we readily concede that Yeshiva's full-time faculty satisfy the Act's criteria for professional status, we reject the Board's position that by the possession and exercise of the broad powers detailed in Part II of this opinion the full-time faculty at Yeshiva act only as professionals and not in a managerial or supervisory capacity.

B. *The Full-Time Faculty Acts Collectively.*

The Board here adheres to the view it first expressed in *C.W. Post Center of Long Island University*, 189 N.L.R.B. 904 (1971) and has reiterated

in *Northeastern University*, 218 N.L.R.B. 247 (1975); *University of Miami*, 213 N.L.R.B. 634 (1974); *Adelphi University, supra;* and *Fordham University, supra.* The Board's position is that since the faculty's supervisory and managerial functions are exercised "on a collective basis" rather than by individual faculty members, they must be denied status as supervisory or managerial personnel. The Board's rationale is not adequately explained in this or in its prior opinions.[14] Section 2(11) does, however, state that it is applicable to "an individual" who possesses the enumerated indicia of supervision. Since the control here in issue is not that of individual faculty member over nonprofessionals, but the collective control exercised by the faculty either in con-

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[14] When the Board first announced this view in *C.W. Post Center of Long Island University, supra*, at 905, it did so without benefit of analysis, and without citation to pertinent administrative decisions, judicial precedents or legislative history. In *Fordham University, supra*, the Board repeated its conclusory approach to the problem. Finally, in *Adelphi University, supra*, the Board conceded that its position arose not from precedent but from its puzzlement in attempting to apply to the unique university governance structure terms which were "designed to cope in the typical organizations of the commercial world." Id. at 648. The Board admitted that it could not square the Act with the university setting in which "power and authority is vested in a body composed of all of one's peers or colleagues." Id. See Kahn, *supra*, at 95, 120-25. In two subsequent decisions, *Northeastern University, supra*, and *Miami University, supra*, the Board refused to further analyze or reconsider the issue of the supervisory or managerial status of full-time faculty. Instead, it dismissed the question, as it did in this case, solely by reference to its earlier rulings.

cert, through department chairmen, or through faculty dominated committees, it must be conceded that if read literally the statutory definition can be construed not to cover the full-time faculty. Since students are not employees the individual faculty supervision over students does not fit within the statutory definition, which requires that the supervisory power be directed to employees. There is the further logical difficulty of holding that the supervisory employees supervise other supervisory employees, cf. *General Dynamics Corp., supra,* at 859; *Post-Newsweek Stations, Capital Area, Inc.,* 203 N.L.R.B. 522 (1973), although this is somewhat defused when we consider that in many of Yeshiva's schools the full-time faculty also supervise collectively the activities of the part-time faculty.

Certainly, however, this Board interpretation is not the only reasonable reading of the language of section 2(11). In view of the statute's ambiguity we are disturbed by other holdings of the Board in which the collective exercise of supervisory authority was *not* grounds for exclusion from that status. Thus in *Florida Southern College,* 196 N.L.R.B. 888, 889 (1972), a case decided after the Board's rulings in *C.W. Post, supra, Fordham University, supra,* and *Adelphi University, supra,* the Board excluded a teaching dean from the faculty bargaining unit because he sat on a *committee* which made effective recommendations regarding the hiring and firing of faculty members. See also *Western Saw Manufac-*

turers, Inc., 155 N.L.R.B. 1323, 1329 n.11 (1965) (foreman held a supervisor in part due to service on a board which determined employee termination). The inconsistent interpretation of this provision by the Board is also troublesome in that the Board refers this court to no legislative history of the section —and our own review has uncovered none—which clearly supports the "collective authority" doctrine which the Board urges upon us. Rather, the history of section 2(11) indicates that such collective supervision simply was not actively considered by Congress at the time. See S.Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947); H.R. Rep. No. 245, 80th Cong., 1st Sess. 13-18 (1947); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35-36 (1947). Indeed, one commentator has stated that there is no citable precedent for the "collective authority" approach first taken by the Board in *C.W. Post, supra.* Kahn, *supra*, at 95. Moreover, we think a construction of section 2(11) as including individuals who exercise supervisory functions as part of a group or committee is a realistic interpretation of the section since group action is so frequently encountered in modern corporate decision making. See, e.g., N. Jacoby, Corporate Power and Social Responsibility 58 (1973); H. Oleck, Non-Profit Corporations and Associations § 183 (1956).

We need not resolve this point, however, since there is no such "individual" statutory restriction in the Board's own concept of "managerial employees." In

fact, in *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc., supra,* the managerial personnel found not to be within the collective bargaining unit exercised their managerial functions as a "team." Id. at 270.[15] Logically, we see no reason that the fact that the policies of a company are created by a group (as indeed they usually are by the Board of Directors) rather than by an individual should be of signficance in determining whether an individual has managerial status, and the Board has advanced no satisfactory rationale for the weight it has given this factor.

C. *The Faculty Acts on Their Own Behalf and Not in the Interest of the Employer.*

As it has done consistently in the past,[16] the Board here denied managerial or supervisory status to the full-time faculty on the additional ground that the faculty is alleged to be acting on its own behalf and

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[15] Cf. *Sida of Hawaii, Inc.*, 191 N.L.R.B. 194, 195 (1971); *Red and White Airway Cab Co.*, 123 N.L.R.B. 83, 85 (1959); *Brookings Plywood Corp.*, 98 N.L.R.B. 794, 798 (1952). In these cases employee-shareholders were excluded from the bargaining units where in the aggregate they held sufficient shares to give them an effective voice in the formulation of corporate policy.

It should also be noted that in *NLRB* v. *Wentworth Institute, supra,* no managerial or supervisory exclusion was found because the court perceived no evidence of "significant faculty impact *collectively or individually.*" Id. at 557 (emphasis added).

[16] *Northeastern University, supra; University of Miami, supra; Adelphi University, supra;* see *New York University, supra.*

not on behalf of Yeshiva, its employer. The record in no way supports this proposition and in its argument the Board simply advances the conclusory statement that collegial action by peers is inherently action in the interest of the faculty themselves, not in the interest of the University *qua* employer. Indeed, this is characterized in the Board's brief as a "circumstance peculiar to most institutions of higher learning." However, looking at the record one cannot escape the conclusion that even assuming that the faculty's determinations on personnel, curriculum, admissions, grading, graduation requirements and other policy issues were motivated by the faculty's own best interests, the fact that the administration and Board of Trustees of Yeshiva so rarely interfered in the faculty decisions indicates that the interests of the faculty and of the University were almost always coextensive. Cf. *NLRB* v. *Scott Paper Co.*, 440 F.2d 625, 630 (1st Cir. 1971) (court rejected Board's argument that tractor owner-operators were not supervisors because authority not exercised in interest of employer company on ground that interests "were so intertwined that powers were exercised for both."); *Deaton Truck Lines, Inc.* v. *NLRB*, 337 F.2d 697 (5th Cir. 1964), cert. denied, 381 U.S. 903 (1965) (same). Certainly, the deans whom the Board found to be supervisory or managerial displayed a remarkable degree of acquiescence and often went so far as to proclaim their identity of interest

with the faculty.[17] The full-time faculty as a whole or through committees have not in fact acted simply in an advisory capacity, nor have they merely made recommendations which were accorded substantial weight; their decisions on major policy issues have, for the most part proved definitive. Our review of the record leads us to conclude that at Yeshiva University, as Director Faivelson remarked of the Teacher's Institute: "The faculty is the school."

Aside from the record, there is nothing in the Board's reasoning which would support the proposition that the full-time faculty is somehow acting on its own behalf and not that of the University. In fact, a realistic assessment of the way in which a university such as Yeshiva functions, demonstrates the inapplicability of the "interest of the faculty" analysis in such a context:

> The faculty, by the very nature of the educational process in institutions of higher education, participates in decision making which in private industry would normally be regarded as a management prerogative. The faculty at most four-year colleges and universities has a voice in determining standards for admissions, curriculum, degree requirements, faculty hiring and promotion, and even tuition rates. Such a state of independence is entirely unknown among the professionals in private industry. Furthermore, in

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[17] For example, Dean Rabinowitz of Erna Michael College testified that his role was "simply [to] carry out the mandate of the faculty," and Dean Komar of Belfer Graduate School saw his position as Dean as "first among equals".

> higher education there is no sharp dividing line between the employer and the employees. The university is, ideally, a professional community in which common educational interests supersede all potential divisions between the faculty and the administration. The university's unique set of goals (education, research, and service) is achieved only by a series of specialist communities working together through their common concern for enlarging and applying their own spheres of knowledge. Thus, there is no sharp dividing line between the community of administrators and the community of faculty, for both have the common goal of striving to further the institution as a house of learning.

Kahn, supra, at 68 (citation omitted).

This concept of "shared authority" in the university and private four year college has its origins in the Middle Ages when teachers united "into a corporate body enjoying more or less autonomy" over the operation of the institution. McHugh, Collective Bargaining With Professionals in Higher Education: Problems in Unit Determinations, 1971 Wis. L. Rev. 55, 65 (hereinafter cited as McHugh). In 1966, a Statement on Government of Colleges and Universities, 52 A.A.U.P. Bull. 375 (1966) (hereinafter cited as Statement), which was jointly formulated and approved by the American Association of University Professors, the American Council of Education, and the Association of Governing Boards of Universities and Colleges, applauded the principle of shared authority among the Board of Trustees, the adminis-

tration, and the faculty. The statement recognized that

> [t]hese three components have the joint authority and responsibility for governing the institution, and the essential and overriding idea is that the enterprise is joint and that there must be "adequate communication among these components, and full opportunity for appropriate joint planning and effort."

Kahn, *supra*, at 71.

Whatever the situation may be in other institutions, the record here establishes no significant divergence between the interests of the faculty and those of the administration or the Board of Trustees. On the contrary, the faculty has initiated, and the administration has repeatedly accepted, major policy determinations which constitute the essence of the University's educational venture. We cannot conclude that the full-time faculty here has acted in its own interest. Even if it had, the University has accepted those decisions without hesitation so consistently that the Board's attempt to dichotomize those interests results in a strained artificial separation. Whether the degree of control exercised by the faculty and the forbearance of the administrators is salutary fiscally and academically is not in issue here. In fact it does exist.

D. *The Faculty is Not Managerial or Supervisory Because it is Subject to the Ultimate Authority of the Board of Trustees.*

Although none of the criteria applied by the Board which we have so far discussed has any particular appeal, the concept that the faculty has neither managerial nor supervisory status because it is subject to the ultimate authority of the Board of Trustees is particularly unconvincing.[18] Normally, every corporation is ultimately operated by its Board of Directors, W. Cary, Corporations 153 (4th ed. 1969), and yet that fact obviously has never precluded a finding that there are managerial or supervisory employees in the corporation. Certainly the President and Vice-Presidents of Yeshiva as well as its Deans are subject to the ultimate authority of the Board of Trustees and yet this does not preclude them from holding managerial or supervisory status.

Section 2(11), in defining a supervisor, expressly includes those who have the power "effectively to recommend" any of the enumerated actions. Obviously then, the section contemplates a review by some higher authority.[19] In another context we have al-

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[18] The Board has also relied on this ground for denial of supervisory and managerial status to faculty in *Northeastern University, supra; University of Miami, supra; New York University, supra; Adelphi University, supra; C.W. Post Center of Long Island University, supra.*

[19] In the industrial context the Board has deemed to be supervisors those whose recommendations of the actions

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> This power to review held by the immediate supervisors of the engineers whose status is at issue does not demonstrate that the latter are not "supervisors" under the Section 2(11) definition. The power to recommend promotion is, of course, not the power actually to promote and consequently *promotion recommendations will always be subject to review by those others who, in fact, have the final power to promote.*

NLRB v. *Metropolitan Life Insurance Co., supra,* at 1177 (emphasis supplied).[20]

Private universities are usually created by charter under the corporation law of the state where they are located. Kahn, *supra,* at 124; see, e.g., N.Y.N.F.P. Corp. Law § 701 (McKinney's Supp. 1976). Hence, invariably there will be ultimate authority existing in a Board of Trustees or Directors. H. Oleck, Non-Profit Corporations, Organizations and Associations 300, 622 (1965). If this factor alone is to preclude full-time faculty members from assuming managerial or supervisory status, no matter what their actual involvement in the governance of an educational institution, then it is difficult to contemplate *any situation* where the statutory and Board-created exemp-

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designated in section 2(11), although reviewed by higher authority, were consistently given effect. E.g., *Transformer Engineers,* 114 N.L.R.B. 1325, 1327 (1955).

[20] See also, e.g., *Amalgamated Local 355* v. *NLRB,* 481 F.2d 996, 999-1000 (2d Cir. 1973); *Eastern Greyhound Lines* v. *NLRB,* 337 F.2d 84, 86 (6th Cir. 1964); *NLRB* v. *Southern Airways Co.,* 290 F.2d 519, 524 (5th Cir. 1961).

tions can be applied. Of course, it may well be that at other institutions the Boards of Trustees have in fact regularly reviewed and rejected faculty recommendations, but this is not the case at Yeshiva.

IV

We are urged by the Board that its factual findings as to employee status are entitled to great weight and are not lightly set aside. *Stop & Shop Companies, Inc.* v. *NLRB*, 548 F.2d 17, 18 (1st Cir. 1977); *NLRB* v. *Monroe Tube Co., Inc.*, 545 F.2d 1320, 1325 (2d Cir. 1976); *Amalgamated Local 355* v. *NLRB*, *supra*, at 100; *NLRB* v. *Metropolitan Life Insurance Co.*, *supra*, at 1172. Thus, a Board determination that an individual is an employee under the Act will stand if it has warrant in the record and a reasonable basis in the statute. E.g., *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298 (1977); *NLRB* v. *Hearst Publications*, 322 U.S. 111, 131 (1944).[21] However, with respect to the status of full-time faculty the Board here has made no factual findings which would preclude supervisory or managerial status, nor has the Board advanced any persuasive rationale for refusing to so categorize Yeshiva's faculty.

The Board concedes, in effect, the substantial impact of the full-time faculty both as supervisors and

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[21] Closer scrutiny of the Board's determinations, however, will result where, as here, the Board has acted inconsistently with prior rulings in reaching its decision. See *Niagara University* v. *NLRB*, 558 F.2d 1116, 1118 (2d Cir. 1977); B. Schwartz, Administrative Law §§ 235-36 (1976).

managers. Its denial of this status, as we have pointed out in Part III of this opinion, is based upon its continuing position, without further exposition, that full-time faculty are merely professional employees under section 2(12) of the Act. But this offers no solution to the problem since prior Board holdings and judicial opinions clearly indicate that the professional may also be supervisory or managerial. The Board has also insisted that since the faculty act collectively, they must be denied supervisory or managerial status. While there may be some arguable warrant for this position on their status as supervisors in the wording of section 2(11), there is no reason in precedent or logic why this factor should be held to preclude managerial status for full-time faculty.

Oddly, the Board also found that department chairmen and faculty who serve on the Committee on Academic Priorities and Resource Allocation and on the University Faculty Review Committee were neither supervisors nor managers because they serve "primarily as instruments of the faculty" in these matters. If we accept the Board's argument that these chairmen and faculty committee members are simply instruments of the faculty, the Board is in the inconsistent position of finding that the full-time faculty at Yeshiva manages or supervises effectively by its collective or collegial action although this is the very process the Board utilizes to disqualify them as supervisors or managers. Another apparent contradiction is the Board's recognition of the ultimate

authority of the Board of Trustees of Yeshiva although this body only acts collectively. Indeed, on the record here the "ultimate authority" of the trustees has little, if any, practical effect since, as at most universities, McHugh, *supra*, at 68; Statement, *supra*, at 376-77, the trustees' authority has been delegated to the faculty and administration.

It is clear that the Congress, when it amended the Act in 1947, had no contemplation that it would be applied to professional faculties in private institutions of higher learning.[22] Their governance is unique and has no counterpart in the commercial business models the Act was designed to regulate.[23] Absent a legislative amendment, it would seem that an appropriate method to explore fully the special problems created by the Board's assumption of jurisdiction here would be by rule-making. See *Trustees of Bos-*

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[22] The legislative history of section 2(12) mentions its applicability to lawyers, engineers, and medical personnel. There is no reference to college or university faculty. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947). See also *NLRB* v. *Wentworth Institute*, *supra*, at 554-55 (finding the legislative history of the Act inconclusive as to whether Congress specifically intended to exclude nonprofit educational institutions from Board jurisdiction). Prior to its decision in *Cornell University*, 183 N.L.R.B. 329 (1970), the Board had refused to assert jurisdiction over nonprofit educational institutions. *Trustees of Columbia University*, 97 N.L.R.B. 424 (1951).

[23] *Adelphi University*, *supra*, at 648; Kadish, The Theory of the Profession and Its Predicament, 58 A.A.U.P. Bull. 120, 122 (1972); Kahn, *supra*, at 69-74, 84-86. See also *Trustees of Boston University* v. *NLRB*, *supra*, slip op. at 7-8.

ton University v. *NLRB*, *supra*, slip op. at 8; *NLRB* v. *Wentworth Institute*, *supra*, at 556. Both the American Association of University Professors (which has filed an *amicus curiae* brief here) and the Association of American Universities have requested the Board to institute a rule-making proceeding to guide the determination of issues in representation cases involving faculty members of colleges and universities. On July 16, 1971 the Board denied the petition, stating in part, "The Board believes that to adopt inflexible rules for units of teaching employees at this time might well introduce too great an element of rigidity and prevent the Board from adapting its approach to a highly pluristic and fluid set of conditions." Quoted in Kahn, *supra*, at 88.

The Board here has argued that each case must rest on its own facts. However, in its adjudicative process the Board has consistently applied the rigid criteria we have discussed. In any event, in this case the facts compel the conclusion under long established standards that the full-time faculty has managerial status, and as the Supreme Court indicated in *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc.*, *supra*, at 289, the Board is not now free "to read a new and more restrictive meaning into the Act." We find here that the Board, for the reasons given, has applied unjustified, arbitrary standards and therefore we refuse to enforce the Board's order. See *Niagara University* v. *NLRB*, *supra*.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirty-first day of July —, one thousand nine hundred and seventy-eight.

Present:

HON. J. EDWARD LUMBARD

HON. WILLAM H. MULLIGAN

HON. WILLIAM H. TIMBERS
Circuit Judges.

77-4182

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

YESHIVA UNIVERSITY, RESPONDENT

YESHIVA UNIVERSITY FACULTY ASSOCIATION, INTERVENOR.

An application to enforce an order of the National Labor Relations Board.

This cause came to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel.

Upon consideration thereof, it is hereby ordered, adjudged and decreed that the application for enforcement be and it hereby is denied in accordance with the opinion of this court with costs to be taxed against the petitioner.

A. DANIEL FUSARO,
Clerk

By /s/ Sara Piovia
Deputy Clerk

APPENDIX C

JPM

D—2484
New York, N.Y.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 2—CA—14697

YESHIVA UNIVERSITY

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION

DECISION AND ORDER

Upon a charge filed on February 4, 1977, by Yeshiva University Faculty Association, herein called the Union, and duly served on Yeshiva University, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 2, issued a complaint and notice of hearing on February 22, 1977, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on or about December 29, 1976, following a Board election in Case 2—RC—16662 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about January 7, 1977, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 7, 1977, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 21, 1977, and on April 1, 1977, respectively, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and issuance of Decision and Order and a further petition for summary judgment and Decision and Order. Subsequently, on April 8, 1977, the Respondent filed a statement in opposition to petition for summary judgment. On April 12, 1977, the Board issued an

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[1] Official notice is taken of the record in the representation proceeding, Case 2—RC—16662, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause entitled "Further Statement in Opposition to Petition for Summary Judgment and Response to Notice To Show Cause."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, opposition to the Motion for Summary Judgment, and response to the Notice To Show Cause, the Respondent essentially attacks the Board's unit determination in the underlying representation case and, accordingly, the validity of the certification of the Union as the exclusive bargaining representative of the employees in that unit. The General Counsel contends, in effect, that the denials and affirmative defenses set forth in the Respondent's answer raise no issues which have not been litigated and determined by the Board in the prior representation proceeding, Case 2—RC—16662, and that there are no issues requiring a hearing. We agree with the General Counsel.

Our review of the record herein, including that in the representation proceeding, Case 2—RC—16662,

shows that, following a hearing before a Board Hearing Officer on the status of certain faculty personnel, the case was transferred to the Board for decision. Respondent and the Union filed with the Board briefs in support of their respective positions. On December 5, 1975, the Board issued a Decision and Direction of Election [2] in which it concluded, *inter alia*, that the unit consisting of all full-time faculty members, excluding part-time faculty and certain other faculty classifications, was appropriate, as they were neither supervisors nor managerial employees but professional employees. Accordingly, the Board directed an election in that unit. An election by mail and manual balloting was conducted between November 16 and December 20, 1976. A majority of the eligible voters cast ballots for the Union and, in the absence of objections to conduct affecting the election results, the Union was certified by the Regional Director on December 29, 1976.

In its submissions, Respondent contends that the Board's Decision and Direction of Election disregarded uncontroverted evidence, countenanced abnormally high supervisory ratios, applied an unjustified "ultimate authority" and "shared responsibility" rationale and a baseless quantitative 50-percent test to the qualitative definition of supervisor embodied in Section 2(11), and ignored the principles dealing with managerial employees enunciated in *Textron*,[3] in

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[2] 221 NLRB 1053.

[3] *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974).

ruling, *inter alia*, that all full-time faculty members, department chairmen and related titles, committee members and other miscellaneous supervisors are not managerial or supervisory personnel under Section 2(11) but are professional employees under Section 2(12) of the Act. Further, Respondent alleges that, by permitting the participation of supervisory and managerial personnel in the election, the Board itself destroyed the laboratory conditions thereof; that the Board allowed the extent of organization to be controlling when it excluded regular part-time faculty members from the appropriate bargaining unit in violation of Section 9(c)(5) of the Act; that by so excluding the regular part-time faculty members without first conducting a rulemaking proceeding pursuant to the Administive Procedure Act the Board violated its obligations under that act; and that the Board abused its discretion by including terminal faculty members in the bargaining unit. We find no merit in these contentions.

Except for the contention that the Board should have engaged in rulemaking before excluding from the unit regular part-time faculty, Respondent is attempting to raise again and relitigate issues which were, or could have been, raised and litigated in the representation case [4] and this it may not do. Further,

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[4] The Board found that the arguments raised by Respondent in the representation case proceeding were similar to those considered and rejected by the Board in several earlier decisions. *Northeastern University*, 218 NLRB 247 (1975); *University of Miami*, 213 NLRB 634 (1974); *New York Univer-*

we find no merit in Respondent's contention that the Board contravened the Administrative Procedure Act by excluding regular part-time faculty members from the appropriate unit without first conducting a rule-making proceeding pursuant thereto. It is well established that adjudicated cases may serve as precedent, and that the Board may apply those precedents [5] to the parties in an adjudicatory proceeding.[6]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[7]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that

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sity, 205 NLRB 4 (1973); *Adelphi University*, 195 NLRB 639 (1972); *Fordham University*, 193 NLRB 134 (1971); *C. W. Post Center of Long Island University*, 189 NLRB 904 (1971); *Yeshiva University*, 221 NLRB 1053, 1054, fns. 5 and 6 (1975).

[5] *New York University*, *supra*, and *University of San Francisco*, 207 NLRB 12 (1973).

[6] *N.L.R.B.* v. *Wyman-Gordon Co., et al.*, 394 U.S. 759 (1969).

[7] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.[3] We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is a private institution of higher education chartered under the State of New York. It maintains offices and educational facilities in the city and State of New York, Borough of Manhattan. During the past year, a representative period, Respondent derived gross revenues from its operations in excess of $1 million from sources other than donations and restricted contributions, of which amounts in

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[3] Respondent has denied the allegations of the complaint concerning the request and refusal to bargain. Attached to the General Counsel's further petition are Exhs. K, L, and M which show that by letter dated January 5, 1977, received on January 7, 1977, the Union requested Respondent to bargain and that previously, by letter dated December 27, 1976, Respondent expressed its intention to obtain legal review of the Union's certification in the courts. The contents of these exhibits which are uncontroverted establish, and the Board finds, that on January 7, 1977, the Union requested and Respondent refused to bargain. See *Paramount General Hospital, Inc.*, 223 NLRB 1017, 1019, fn. 8 (1976).

excess of $50,000 were derived from sources located outside the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Yeshiva University Faculty Association is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans who are employed by the Employer at its Campus, exclusive of faculty at Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Semi-

nary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and all supervisors as defined in Section 2(11) of the Act.

2. The certification

On December 20, 1976, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 2, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on December 29, 1976, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about January 7, 1977, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about January 7, 1977, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.[9]

Accordingly, we find that Respondent has, since January 7, 1977, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to

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[9] See fn. 8, *supra*.

labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Yeshiva University is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Yeshiva University Faculty Association is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visting thereof, department chairmen, division chairmen, senior faculty and assistant deans who are employed by the Employer at its Campus, exclusive of faculty at Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel;

guards, and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 29, 1976, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 7, 1977, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Rela-

tions Board hereby orders that Respondent, Yeshiva University, New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Yeshiva University Faculty Association as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visting thereof, department chairmen, division chairmen, senior faculty and assistant deans who are employed by the Employer at its Campus, exclusive of faculty at Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus

faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and all supervisors as defined in Section 2(11) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its offices and educational facilities in New York, New York, copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately

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[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 24, 1977

Howard Jenkins, Jr., Member

John A. Penello, Member

Betty Southard Murphy, Member

[SEAL]

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Yeshiva University Faculty Association as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the abovenamed Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or, any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans who are employed by the Employer at its Campus, exclusive of faculty at Albert Ein-

stein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and all supervisors as defined in Section 2(11) of the Act.

YESHIVA UNIVERSITY
(Employer)

Dated ——— By ———————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 36th Floor—Federal Building, 26 Federal Plaza, New York, New York 10007, Telephone 212—264-0360.

APPENDIX D

Yeshiva University and Yeshiva University Faculty Association, Petitioner. Case 2—RC—16662

December 5, 1975

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN MURPHY AND MEMBERS JENKINS AND PENELLO

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Clifford P. Chaiet. Pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, and by direction of the Regional Director for Region 2, this case was transferred to the National Labor Relations Board for decision. Thereafter, the Employer and the Petitioner filed briefs in support of their respective positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. Yeshiva University, also referred to herein as the Employer or the University, is a private institution of higher education chartered under the laws of the State of New York. Its offices and educational facilities are located on four campuses in New York, New York.[1] During the past year the University derived gross income in excess of $1,000,000 from sources other than donations and restricted contributions. At least $50,000 of this income was derived directly from sources located outside the State of New York. Based on the foregoing stipulated facts, we find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the policies of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.[2]

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[1] The University is composed of 12 schools and colleges and a number of programs. These are as follows: Yeshiva College, Bernard Revel Graduate School (whose summer session is known as the Harry Fischel School), James Striar School of General Jewish Studies, Wurzweiler School of Social Work, Stern College for Women, Erna Michael College for Hebraic Studies, Teachers Institute for Women, Ferkauf Graduate School of Humanities and Social Sciences, Belfer Graduate School of Science, Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Rabbi Isaac Elchanan Theological Seminary, Community Service Division, Cantorial Training Institute, Sephardic Studies Program, Yeshiva Program, and Sephardic Community Action Program.

[2] The Employer took the position that the Petitioner and its component bodies, the Faculty Associations of the Belfer Graduate School of Science, the Ferkauf Graduate School of

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The Yeshiva University Faculty Association herein referred to as the Petitioner or YUFA seeks to represent a unit including all faculty appointed to the University in the titles of professor, associate professor, assistant professor, instructor with a full-time teaching load or the equivalent, excluding part-time faculty, lecturers, faculty of the Albert Einstein College of Medicine, the Sue Golding Graduate School of Medical Sciences, the Yeshiva High School, the Rabbi Isaac Elchanan Theological Seminary, the Cantorial Training Institute, the Community Service

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Humanities and Social Sciences, and the Yeshiva College, were formed by supervisory employees of the University thereby taking the organization outside of the definition of a labor organization as stated in the Act. However, it is clear from the record that the Petitioner is an organization "in which employees participate" and which exists for the purpose of bargaining collectively with the Employer. The Petitioner thus meets the definition of "labor organization" set forth in Sec. 2(5) of the Act. Further, it is clear that the Petitioner was organized primarily by faculty found, *infra*, to be non-supervisory employees. The participation in the organizational effort by three principal investigators, found to be supervisors, *infra*, does not remove Petitioner from the definition of a labor organization in light of substantial employee participation in the Petitioner. *Directors Guild of America, Inc. (Association of Motion Picture & Television Producers, Inc.)*, 198 NLRB 707 (1972). We also note that questions relating to showing of interest are not litigable in representation proceedings. *Tappan Division of Tappan Incorporated*, 193 NLRB 989 (1971).

Division, the Sephardic Community Activities Program, the James Striar School, the Teachers Institute for Women, and the Sephardic Studies Program, librarians, research associates, research assistants, visiting faculty whose employment at the University is for a fixed 1-year period and who are faculty members at another academic institution, emeritus faculty who are not actively engaged in teaching at the University, faculty whose initial and subsequent appointment is subject to special funding derived in the main from nonuniversity funds, deans and acting deans, directors, the Registrar, and other officers of the University.[3]

The Employer initially takes the position that all faculty members of the University are managerial or supervisory personnel and are therefore not employees within the meaning of the Act. In the alternative, the Employer seeks a unit of all full-time and regular part-time faculty members.[4] The Employer would exclude from this unit as managerial and/or supervisory, department chairmen and their concomitants,

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[3] At the close of the hearing, the Petitioner indicated that it did not seek to represent faculty at the University's Teachers Institute for Women, herein referred to as Teachers, inasmuch as the professors at Teachers labeled "full-time" by the University do not hold faculty appointments but are actually part-time faculty.

[4] Under the University's definition, part-time (that is, half the normal full-time load of 12 hours) would include the faculty members teaching at least 6 hours in the semester in which the election is held and in both semesters of the preceding 3 academic years.

members of the University's committee on academic priorities and resource allocation and the faculty review committee, assistant deans, principal investigators of research and training grants, faculty who have as of date of the election, received notice that their appointment will be terminated or will not be renewed, have notified the University that they intend to resign, or have reached the University's mandatory retirement age. The Employer would not exclude, as would the Petitioner, full-time faculty whose appointments are subject to funding from research grants or from other nonuniversity sources, faculty with the rank of "lecturer," and faculty at Teachers. The Employer does not disagree with the other exclusions sought by the Petitioner.

In contending that no faculty bargaining unit can be appropriate because all faculty members—by virtue of their group participation in faculty governance—are supervisory or managerial and are, thereby, not employees within the meaning of the Act, the Employer requests that the Board reconsider its previous decisions on this issue.[5] The Employer urges, further, that, in any event, the Board reach a contrary result herein on the ground that this particular faculty has authority which is different from and more extensive than the authority vested in the faculties which were the subjects of the earlier cases.

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[5] *Northeastern University*, 218 NLRB No. 40 (1975); *University of Miami*, 213 NLRB 634 (1974); *Adelphi University*, 195 NLRB 639 (1972); *Fordham University*, 193 NLRB 134 (1971); and *C. W. Post Center of Long Island University*, 189 NLRB 904 (1971).

We find from our examination of the record, however, that the role and authority of the faculty herein with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different from what they were in the cited cases,[6] wherein the same arguments were rejected. At Yeshiva University, faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than "in the interest of the employer,"[7] and final authority rests with the board of trustees. As in the earlier decisions, we find that the faculty members are professional employees under the Act who are entitled to vote for or against collective-bargaining representation.

Unit Composition

Part-time faculty: The Petitioner would exclude, while the Employer would include, part-time faculty members. For the reasons set forth in our decisions in *New York University, supra,*[8] and *University of*

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[6] See fn. 5, *supra.* See also *New York University,* 205 NLRB 4 (1973).

[7] Sec. 2(11) of the Act.

[8] The Employer argues that application of the factors relied on by the Board in *New York University* requires the inclusion of regular half-time faculty members here. However, while there is some involvement of part-time faculty in issues of curriculum and standards in the Jewish Studies Programs, for the most part the part-time faculty, by both regulation and practice, play a significantly lesser role in student and

San Francisco, 207 NLRB 12 (1973), we shall exclude part-time faculty from the bargaining unit found appropriate herein.[9]

Members of committee on academic priorities and resource allocation and faculty review committee: The Employer contends that members of these committees have substantial managerial and supervisory powers and must, therefore, be excluded from the unit. The record, however, demonstrates that the faculty members on each of the two committees are *elected by the faculty* and serve as representatives of the faculty rather than of management. As we have found, *supra*, authority exercised by the faculty as a group on the basis of collective discussion and consensus is not sufficient to render the individual members of

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faculty affairs at the University than do full-time faculty. The record herein amply demonstrates a lack of mutuality of interest between the part-time and full-time faculty at Yeshiva University similar to that requiring exclusion of part-time faculty in *New York University* and *University of San Francisco*.

[9] The record indicates that there are currently no faculty members at Teachers holding full-time appointments with the University; rather the faculty listed by Teachers as teaching a full 12-hour load are, in fact, part-time faculty without University appointment. Accordingly, such part-time faculty members are not eligible to vote in the election. However, as there is no basis for excluding from the unit any full-time faculty members at Teachers should any such University appointments be made in the future, faculty at Teachers holding full-time appointments with the University will be included in the unit. As the faculty in the title "lecturer" work part-time, employees in that classification are excluded from the unit as part-time employees.

such group supervisors within the meaning of the Act.[10] We therefore find that the several members of the two above-named committees are not supervisory or managerial representatives of the University, and we shall include them in the bargaining unit.

Department chairmen, division chairmen, and senior faculty: The Employer contends that the department chairmen and their concomitants are managerial and/or supervisory employees and, as such, must be excluded from the bargaining unit. The Petitioner asserts that the department chairmen and senior faculty do not qualify as supervisory or managerial and seeks their inclusion in the unit.

As in the *University of Miami, supra*, department chairmen are generally appointed by the dean of their school or college, after consultation with the departmental faculty concerned—whose recommendation is usually, although not always, followed. Indeed, at Belfer, Revel, Ferkauf, and Yeshiva College, the department or division chairmen are actually *elected* by the faculty of their respective departments or divisions. Further, department chairmen have been subject to recall several times by their faculty membership.

The chairmen have regular faculty appointments and teach classes. It appears from the record that they do not receive any extra pay or stipend as chairmen, but they do have their teaching obligations somewhat reduced in many cases.

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[10] *Adelphi University*, 195 NLRB 639, 648 (1972); *C. W. Post Center of Long Island University, supra.*

Belfer's Dean Koman testified that department chairmen at Belfer recommend faculty salaries to the dean but such salaries are subject to approval by the vice president of the University, and individual faculty members can and have gone directly to the president of the University to adjust the recommended figures. The recommendations, arrived at by a consensus of the department members, as to hiring, firing, or granting tenure are relayed through the chairmen.

The dean at Erna Michael testified that when a new faculty member is needed, he approaches the "senior professor," if there is one for the subject area involved, or a number of other faculty people if there is no senior professor, and asks if they know of anyone. Another source is letters or requests for positions received by the dean or "any other of the well-known members of the faculty." According to the dean's testimony, if a particular application looks good or if a faculty member has someone in mind, the dean asks the faculty member to interview the person in question; about 50 percent of the time the dean also participates in the initial paper screening and sometimes participates in the interviews.

Rabbi Besdin, Director of Striar, testified that the two department chairmen were chosen with the consensus of faculty and that other faculty, as well as department chairmen, may play a consultative role regarding hiring.

The testimony of Dean Gittler of Ferkauf indicates that recommendations on hiring come from the consensus of the department through the chairman.

Wurzweiler has no "chairmen" or "senior professors." The Employer argues that the convenors, the chairman of the admissions committee, the field instruction coordinator, and the chairman of the doctoral committee perform many of the supervisory and managerial duties of the school. The record indicates that the primary duties of these personnel involve, respectively, coordination of teaching approaches in each division, direction of students' admission, selection of social agencies for placement of students (a responsibility delegated by the faculty), and establishment of requirements for the doctorate degree.

Rabbi Landman of Revel testified that the department chairman's recommendations on the hiring of full-time and part-time faculty members appear to be arrived at by consensus of the department faculty.

The testimony of Dean Mirsky of Stern indicates that he has consulted with Stern's chairmen and generally obtained the approval of the department chairmen before submitting recommendations to the president with regard to the hiring of new employees and the reappointment of faculty. Dean Mirsky has, however, acted contrary to a department chairman's recommendation, and the chairmen do not have the authority to effectuate a reappointment denied by the dean.

According to Dean Bacon of Yeshiva College, the division chairmen, who are elected by the faculty of the particular division, make up the advisory council to the dean. Collectively they deliberate and recom-

mend, through the chairman of the division involved, action on such matters as promotions and sabbaticals. The senior faculty at Yeshiva College, faculty members with the most seniority in each subject area,[11] review applicants for faculty positions and recommend the most outstanding to Dean Bacon, who makes an independent review of the applicants' qualifications before referring such recommendations to the president.

As with the final authority to appoint and reappoint, exclusive authority for the granting of tenure is vested in the president. The record does not indicate that department chairmen play a significant role in this process. The departments at Belfer collectively make tenure recommendations which Dean Koman passes on to the president; the dean at Wurzweiler, individually, makes the recommendations to the president. At Ferkauf, a council of all tenured faculty considers award of tenure, but the dean chairs the council and retains, and has exercised, veto power over its recommendations.

The Board has considered many factors in determining whether department chairmen should be included in a unit of faculty. One of the crucial factors is the role of the chairmen in faculty personnel decisions such as hiring, firing, and other changes of status. In appropriate cases where the chairman's authority has been effectively diffused among the de-

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[11] The subject areas at Yeshiva College are organized in broad "divisions."

partment faculty pursuant to the principle of collegiality, the Board has included the chairmen.[12] The record in the present case demonstrates that the department chairmen, division chairmen, and senior faculty at Yeshiva fall within this qualification.

On the record before us, it appears that, although they have certain formal responsibilities with respect to decisions on such matters as appointment, promotion, and tenure, the department chairmen and their concomitants act primarily as instruments of the faculty in these matters. The department chairmen, in these respects, therefore stand largely on the same footing as the faculty, from whom they receive their authority. All major recommendations, including hiring, appear to be done on a collegial basis. Further, as previously noted, the department chairmen at Yeshiva receive no additional remuneration for assuming the position of chairman.

Accordingly, we find that the department chairmen, division chairmen, and senior faculty are neither supervisors nor managerial employees and shall include them in the unit.[13]

Assistant deans: The Petitioner seeks to include in the unit the two assistant deans, Patt at Belfer and Wischnitzer at Yeshiva College. The Employer would exclude them as supervisory and/or managerial. It

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[12] *Northeastern University, supra.*

[13] *Northeastern University, supra; Fordham University*, 214 NLRB No. 137 (1974); *University of Miami, supra; New York University, supra.*

does not appear from the record that they are ever delegated the supervisory authority possessed by the deans under whom they serve.[14]

Both of the assistant deans hold faculty appointments, are paid in the faculty classifications and fulfill teaching responsibilities within the academic departments with which they are affiliated. Further, the assistant dean at Belfer has been elected by the faculty to serve as faculty representative on several committees.

Based on the foregoing we find that the assistant deans are neither supervisors nor managerial employees.[15] Accordingly, we shall include them in the bargaining unit herein.[16]

Terminal faculty members: As noted, *supra*, the Employer seeks to exclude faculty resignees, terminees, and retirees.[17] Petitioner seeks inclusion of these

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[14] Although Dean Komar testified that Assistant Dean Patt "replaces" him during Komar's absences, there is no testimony indicating that during such time Patt was empowered to make any determinations with regard to hiring, firing, promotions, tenure, or any other change in status or to exercise any other supervisory or managerial function.

[15] *University of Miami, supra.*

[16] Chairman Murphy is of the view that the record in this case is insufficient to make a determination as to whether the assistant deans are supervisors within the meaning of the Act. Accordingly, the Chairman would vote the two assistant deans by challenged ballot.

[17] Upon notice of resignation or termination, the full-time faculty member is expected to continue his employment through and until the end of the academic year. Further, terminations may be appealed, and a faculty member may continue beyond the retirement age on a year-to-year basis with the president's permission.

faculty members. The Employer, recognizing that in previous university cases the Board has uniformly included such employees in faculty bargaining units,[18] urges the Board to reconsider its holding on this issue. After due consideration, we have decided to adhere to our longstanding position with regard to terminal employees, since while their employment continues they have a substantial community of interest with their colleagues. Therefore, faculty members who have received notice that their appointments will be terminated or will not be renewed, have notified the University that they intend to resign, or have reached the University's mandatory retirement age will be eligible to vote in the election herein provided that they are still employed as faculty members at the time of the election.

Principal investigators: The Petitioner seeks to include in the unit principal investigators. The Employer argues that they possess supervisory and managerial authority and must be excluded.

Principal investigators are faculty members who prepare grant proposals and administer the projects once funds have been awarded by government or private agencies.

The principal investigator is responsible, subject only to approval of the deans and University administration, for the hiring of full-time and part-time members of the Yeshiva faculty, research associates,

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[18] See *Fordham University, supra; New York University, supra; Manhattan Collge*, 195 NLRB 65 (1972).

research assistants, clerical and other support personnel for work on his project. The record shows that the principal investigator prepares the budget for a grant and sets salaries within broad University guidelines. The record also demonstrates that the principal investigators have the authority to reprimand and terminate the services of all grant employees. Day-to-day supervision of grant employees is also carried out solely by the principal investigator.[19] The principal investigator adjusts the complaints and grievances of the grant employees.

As in *Northeastern University, supra,* all of the employees who work on grants and contracts under the direction of a principal investigator are employees of the University and not of the granting agency. These employees are paid by Yeshiva and receive the fringe benefits available to other employees. Yeshiva makes payroll deductions for grant employees similar to the deductions made for other employees.

In the instant case, as in *Rensselaer Polytechnic Institute,*[20] the employees supervised by the principal investigators are employees of the University, and, therefore, the principal investigators herein are super-

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[19] While it is difficult to determine the amount of time actually spent by the principal investigators in grant supervision, the University allocates 50 percent of a principal investigator's time for administration of grants. Further, testimony indicates that "absolutely more than half of the time" has been spent by a principal investigator in the supervision of nonunit employees.

[20] 218 NLRB No. 220 (1975).

visors in their relationship to their Employer.[21] Therefore, we find them to be supervisors within the meaning of the Act and exclude them from the unit found appropriate herein.

Full-time faculty whose appointment is subject to special funding and derived from non-University funds: Contrary to the Employer, the Petitioner would exclude the two faculty members who have been hired primarily to perform research activities under a research grant.

Although listed by the University as full-time faculty (one under the title "Research Assistant Professor") neither of the two faculty members in this category have appointment letters from the president, and they are ineligible for tenure, sabbatical leave, or other perquisites enjoyed by full-time faculty. Further, it appears that their salaries are determined under the grant proposals upon which their employment is dependent.

Under these circumstances, it appears that these two faculty members whose appointment is subject to special funding have a community of interest with the research associates and research assistants, stipulated out of the unit by the parties, rather than with the appointed full-time faculty herein. Accordingly, we shall exclude them from the unit.

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[21] In *Fordham, supra,* and *New York University, supra,* the principal investigators were found not to be supervisors in their relationship to their employers and were included in the unit. However, in both cases, the employees hired by them were not and did not become employees of the university.

In accordance with the above, we find that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time faculty members appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans, but excluding faculty at Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty; lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is subject to special funding derived in the main from non-University funds or whose initial or subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and supervisors as defined in the Act.

[Direction of Election and *Excelsior* footnote omitted from publication.]

APPENDIX E

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their griev-

ances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (1) predominately intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion in judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of higher specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * * ;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) * * * .

* * * * *

Supreme Court, U. S.
FILED
JUN 22 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-857

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

YESHIVA UNIVERSITY

No. 78-997

YESHIVA UNIVERSITY FACULTY ASSOCIATION,

Intervenor-Petitioner,

v.

YESHIVA UNIVERSITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE YESHIVA UNIVERSITY FACULTY ASSOCIATION

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BRIEF FOR THE YESHIVA UNIVERSITY FACULTY ASSOCIATION

Opinions Below

The opinion of the court of appeals (Pet. App. la-42a) is reported at 582 F.2d 686. The decision and order of the National Labor Relations Board (Pet. App. 45a-62a) are

reported at 231 NLRB 597. The Board's decision and direction of election in the underlying representation proceeding (Pet. App. 63a-79a) are reported at 221 NLRB 1053.

Jurisdiction

The judgment of the court of appeals (Pet. App. 43a-44a) was entered on July 31, 1978. The petitions for a writ of certiorari were filed on November 27, 1978 (No. 78-857) and December 19, 1978 (No. 78-997), within the period for filing as extended by Mr. Justice Marshall. Both petitions were granted on February 21, 1979 (A. 3-4).[1] This Court's jurisdiction rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Whether the National Labor Relations Board ("the Board") properly concluded that the faculty of Yeshiva University ("the University") are neither supervisors nor managers pursuant to the National Labor Relations Act ("the Act").

2. Whether there exists substantial evidence in support of the findings and conclusions of the Board in its decision in the underlying representation proceeding.

Statute Involved

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* are reproduced at Pet. App. 80a-82a.

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[1] References to the record of the underlying proceedings are indicated as follows: "A." refers to the joint appendix filed in this Court; "Tr." refers to the transcript in the representation proceeding; and "Emp. Exh." and "U. Exh." to University and Union exhibits, respectively, in that proceeding.

Statement

The history of the underlying proceedings, the structure of the University, and the respective roles of faculty and administration in the governance of the University are set forth in the Brief of the Board, pp. 5-20, and will not be reiterated here. Additional, relevant factual discussion has been incorporated in the Argument, *infra*.

Summary of Argument

1. Congress amended the Act in 1947 to exempt supervisors, as representatives of the employer, from its coverage. Its purpose was to avoid the division of supervisors' loyalty between the interests of the employer and a union, as well as to avoid an imbalance of power in the collective bargaining relationship which might result from the unionization of supervisors. The statutory definition of "supervisor," Section 2(11) of the Act, 29 U.S.C. 152(11), thus expressly requires that such persons act "in the interest of the employer." The Board's definition of "manager," as upheld by this Court, likewise requires that such persons exercise authority in the interest of the employer or are otherwise aligned and identified with the employer.

Section 2(12) of the Act, 29 U.S.C. 152(12), was also enacted in 1947, providing coverage under the Act specifically to "professional employees," including those who supervise junior professionals in the course of their professional training. Although professional employees may also be supervisors or managers, their exercise of authority in the fulfillment of their professional mission, rather than in the interest of the employer, does not warrant their exclusion as supervisors or managers.

In the statutory scheme of the Act, Congress has delegated to the Board the function of determining which classes of employees, including professionals, enjoy protection under the Act. This Court has called for judicial deference to Board determinations in this area in view of the administrative expertise of the Board and its greater familiarity with the underlying facts and conditions on which such determinations are based. In the instant proceeding, the Board found the University faculty to be covered under the Act, consistent with each of its prior rulings which applied Board law to the status of faculty in higher education.

The University faculty are professional employees, who collectively exercise certain influence over matters affecting the educational venture of the institution. That influence is a function of the *deference* allowed to the faculty, rather than authority *invested* in them by University management. Those areas in which the University may defer to faculty recommendations are precisely those involving their professional expertise; *e.g.*, curriculum, grading standards, peer evaluation, etc.

Despite the wisdom or appropriateness of faculty recommendations in these areas, however, University management reviews all such action originating from the faculty; reevaluates that action according to fiscal concerns and other managerial interests apart from those of the faculty; and exercises the ultimate authority to accept, reject, and/or implement recommendations from the faculty. Although they may share an ultimate goal of academic excellence, managerial concerns and prerogatives, separate from the professional interests of the faculty, impose fiscal and other constraints on the faculty's pursuit of that goal.

The lower court erred in its merger and identification of the interests of the faculty with those of the management of the institution.

2. In the enactment of the 1974 amendments to the Act, which extended Board jurisdiction over nonprofit health care employers, Congress recognized the exercise of jurisdiction by the Board in the area of higher education. Congress also considered the application of Section (11) to health care professionals as a result of proposals by organizations of health care professionals to amend Section 2(11). Congress chose, however, to rely on the Board's expertise and existing body of administrative law in drawing the distinction between professional and supervisory employment in the health care field.

Congress reviewed the experience of the Board in professional employee unit determination in other fields, with specific reference to faculty in higher education. In deferring the issue to the Board for case-by-case determination, the legislative history emphasized the distinction between supervision in the fulfillment of one's professional mission and supervision in the interest of the employer.

The legislative history of the 1974 amendments to the Act indicates congressional approval of the Board's exercise of jurisdiction over faculty in higher education.

3. The lower court failed to apply the standard of substantiality of the evidence in its review of the factural findings of the Board and reached its conclusion despite the substantial evidence on the record in support of the findings of the Board. The court did not defer to the expertise and fact-finding role of the Board, but imposed its judgment over that of the Board in the findings of facts on which it based its determinations of law. The court erred in reaching its conclusions on the record here, and erred specifically as to the interpretation and application of certain material evidence.

ARGUMENT

I.

The University faculty are neither supervisors nor managers, and are covered under the protection of the National Labor Relations Act.

A. The Exclusion of Supervisory and Managerial Personnel and the Inclusion of Professional Employees under the National Labor Relations Act.

There is no dispute as to the status of the University faculty as professional employees (Pet. App. 25a). The court below concluded, however, that the faculty are employed not only as professionals, but also as supervisors and managers (*id.* at 42a).

While the Act excludes supervisors and managers from its coverage,[2] it includes express provisions for the coverage of professional employees.[3] Although the Board has consistently balanced these legislative enactments in determining that faculty action in the areas of authority enumerated in Section 2(11)[4] derive from their professional status and mission rather than their alignment or identification

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[2] The definition of "employee" contained in Section 2(3) of the Act, 29 U.S.C. 152(3), excludes "any individual employed as a supervisor." See Pet. App. at 80a. The Act has also been authoritatively interpreted to exclude managerial employees from its coverage. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1973).

[3] Section 2(12) of the Act, 29 U.S.C. 152(12) defines the term "professional employee," and provides for the coverage of such employees by the Act. Section 9(b)(1), 29 U.S.C. 159(b)(1), precludes the Board from placing professional employees in the same unit with employees who are not professional employees "unless a majority of such professional employees vote for inclusion in such unit." See Pet. App. at 81a.

[4] See Pet. App. at 80a-81a.

with the employer and its mission,[5] these dual directives are directly counterposed in the determination here at issue.

The professional status of the University faculty, as contemplated in the legislative and adjudicatory history of the Act, does not preclude a finding of their status as managers or supervisors, but requires a distinction between their identification as professional employees and as supervisory or managerial representatives. The court below failed properly to weigh or consider this distinction in determining the status of the University faculty.

The legislative history of the statutory exclusion of supervisors (29 USC 152 (11)) and the grant of special unit treatment for professional employees (29 USC 159 (b) (1)) reflects, in the words of one commentator, "a latent inconsistency which is delegated to the Board for resolution."[6] This "inconsistency" originates from the legislative efforts to exempt supervisory personnel from the Act after the Board's ruling in *Packard Motor Co.*, 61 NLRB 4 (1945),[7] that supervisory employees are entitled to protection under the Wagner Act. In view of that ruling and in the wake of growing success by the labor movement in the organization of foremen and other supervisory staff, the Senate Report on the Taft-Hartley amendments recommended the exemption of supervisors from the coverage under the Act:

> "A recent development which probably more than any other single factor has upset any real balance of power in the collective bargaining process has

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[5] See p. 11, *infra*, and *Wentworth Institute*, 210 NLRB 345, *enforced*, 515 F.2d 550 (1st Cir. 1975); *Kendall College*, 228 NLRB 1083 (1977), *enforced*, 570 F.2d 218 (7th Cir. 1978); *Boston University*, 228 NLRB 1008 (1977), *enforced*, 575 F.2d 301 (1st Cir. 1978), *petition for cert. pending*, No. 78-76; *Goddard College*, 234 NLRB 169 (1978).

[6] Finkin, *The NLRB in Higher Education*, 5 U. Tol. L. Rev. 608, 639 (1974).

[7] See *Packard Motor Co.* v. *NLRB*, 330 U.S. 45 (1947).

> been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as a part of the management, into organizations composed of or subservient to the unions of the very men they were hired to supervise." S. Rep. No. 105, 80th Cong., 1st Sess., 3, 4 (1947).

The legislative history of the supervisory exclusion is replete with similar findings and conclusions of the legislature. In *Beasley* v. *Food Fair of North Carolina*, 416 U.S. 653 (1973), this Court noted the singular "objective" of both the House and Senate in enacting this amendment to the Wagner Act:

> "Employers were not to be obliged to recognize and bargain with unions including or composed of supervisors, because supervisors were management obliged to be loyal to their employer's interests and their identity with the interests of rank-and-file employees might impair that loyalty and threaten realization of the basic ends of federal labor legislation.
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> "This [legislative] history compels the conclusion that Congress' dominant purpose in amending §§ 2(3) and 2(11), and enacting § 14(a), was to redress a perceived imbalance in the labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests. See generally *NLRB* v. *Bell Aerospace Co.*, [416 U.S. at 267]. We conclude, therefore [that the amendments to the Act do not require] an employer 'to accord to the front line of management a nominal status of employees.' S. Rep.

> No. 150, *supra*, at 5." *Beasley* v. *Food Fair of North Carolina, supra*, at 659-60, 661-62 (footnotes omitted).

In the consideration of the Taft-Hartley amendments, some members of Congress, including Senator Ellender, whose statutory proposal was the basis for § 2(12), sought to exclude professional employees specifically from the Act's protection.[8] These efforts failed, however, and § 2(12) was enacted, including within the definition of a professional employee both the fully recognized professional and one who is "performing related work *under the supervision* of a professional person to qualify himself to become a professional employee."[9] The performance of such "supervision" by the senior professional would thus not exempt him or her from coverage. The Conference Committee Report, recommending § 2(12) for passage, thus points to a community of interest between the two classes of professional employees:

> "This definition in general covers such persons as legal, engineering, scientific and medical personnel *together with* their junior professional assistants." H.R. Conf., No. 510, 80th Cong., 1st Sess., 36 (emphasis supplied).

This Court considered the history of this legislation in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1973), as it pertained to the policy considerations supporting the exclusion of managerial and confidential employees from coverage

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[8] 2 NLRB, *Legislative History of the Labor-Management Relations Act of 1947*, at 695. See also *Hearings on Amendments to the National Labor Relations Act before the House Comm. on Education and Labor*, 80th Cong., 1st Sess., 1135 1225 (1947); *Hearings on S.55 and S.J. Res. 22 Before Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess., 694 (1947).

[9] 29 U.S.C. § 152(12) (emphasis added).

under the Act. Justice White's partial dissent points to the explicit inclusion of professional employees, relative to the implicit exclusion of managerial and confidential employees which the majority upheld:

> "It is apparent, it seems to me, that there are many professional employees who would qualify as managerial employees; yet the Act clearly treats them as employees for the purpose of the Act and Congress assumed they would have full organizational and bargaining rights unless it was provided otherwise in accordance with congressional desires. Hence, § 9(b)." *Id.* at 298.

The majority responded to Justice White by noting that professional employees are "plainly not the same" as managerial employees. *Id.* at 285, n. 13. The majority did not, however, address any distinctions between them, but cited only the legislative definition of professional employees and the Board definition of managers in *Ford Motor Co.*, 66 NLRB 1317 (1946).

The apparent tension in the statutory scheme providing for coverage of professional employees and the exemption of supervisory and managerial employees has been left to administration by the Board in its professional employee bargaining unit determinations. See Finkin, *The Supervisory Status of Professional Employees*, 45 Fordham L. Rev. 805 (1977). This Court has repeatedly recognized that "the task of determining the contours of the term 'employee' has been assigned primarily to the agency created by Congress to administer the Act." *Allied Chemical & Alkali Workers* v. *Pittsburg Plate Glass Co.*, 404 U.S. 157, 166 (1971); *NLRB* v. *Hearst Pub. Inc.*, 332 U.S. 111, 130 (1944). Judicial deference has thus been afforded to decisions of the Board that particular individuals are in-

cluded or excluded from the Act's coverage. *Bayside Enterprises, Inc.* v. *NLRB,* 429 U.S. 298, 304 (1976); see also, *Trustees of Boston University* v. *NLRB,* 575 F. 2d 301 (1st Cir. 1978), *petition for cert. pending,* No. 78-67. This principle of judicial deference becomes particularly relevant in the context of the Board determination in the underlying proceeding here at issue.

The Board ruled on the basis of a record exceeding 4600 pages of testimony and 200 exhibits that the faculty of Yeshiva University are neither supervisory nor managers:

> "We find from our examination of the record, however, that the role and authority of the faculty herein with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different from what they were in [*New York University,* 205 NLRB No. 4 (1973); *Northeastern University,* 218 NLRB 40 (1975); *University of Miami,* 213 NLRB No. 634 (1974); *Adelphi University,* 195 NLRB No. 639 (1972); *Fordham University,* 193 NLRB No. 134 (1971); and *C.W. Post Center of Long Island University,* 189 NLRB No. 904 (1971)], where the same arguments were rejected. At Yeshiva University, faculty participation in collegial decision-making is on a collective rather than individual basis, is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the Board of Trustees. As in the earlier decisions, we find that the faculty members are professional employees under the Act who are entitled to vote for or against collective-bargaining representation." Pet. App. 68a (footnote omitted).

With reference to the foregoing statutory history, we address below two areas of inquiry which bear directly on

the determination of whether faculty exercise such authority or are so aligned with management as to warrant their exclusion as supervision or managers: (i) the professional character of faculty employment, and (ii) the priority of interests they serve in their employment.

B. The Faculty as Professional Employees

The court below acknowledged that the authority of the University faculty to determine course content and teaching and student evaluation methods falls within Section 2(12) of the Act and "should not characterize them as managerial or supervisory" (Pet. App. 26a). But because the faculty exercise what the Court described as "extensive control" with respect to curriculum, workload, rank, salary and tenure of other faculty, and other University policy, "they are no longer exercising individual professional expertise [but are] in effect, substantially and pervasively operating the enterprise" (*id.* at 27a).

Although Section 2(12) defines a "professional employee," *inter alia*, as any employee whose work involves the "consistent exercise of discretion and judgment," the lower court found that the discretion and judgment afforded faculty in a unique, collegial mode gives rise to "a state of independence and influence on policy which is 'entirely unknown among the professionals in private industry'" (Pet. App. 28a). But the court failed to consider the nature of the influence which faculty exercise and how that influence is wielded in the collegial context.

The court mistook the role of the faculty in the fulfillment of their individual professional missions for their interest in "operating the enterprise" (*id.*). The role or mission of the professional employee may often correspond with the mission of his employer. For the hospital physician, for example, it is to render the highest quality of

medical care; for the community legal service lawyer, the delivery of the most effective advocacy and representation; and for the faculty member, the practice of optimum didactic skills. While the hospital, legal services program or university may be dedicated in purpose to corresponding aspirations, they must be operated with a separate, even sometimes conflicting perspective related to fiscal and other managerial constraints.

Professional employees' decisions to discharge or operate on a patient, to appeal a ruling, or to deny or grant admission to certain students may all ultimately affect the employer's finances or policy, but only as an unavoidable consequence of the fulfillment of their professional obligations in exercising the discretion required for the *professional* decision required. These actions do not derive from managerial or supervisory prerogatives. They are rather the fulfillment of the discretion and expertise inherent to the professional and implicit in his or her job responsibilities. They operate in no vacuum, but are subject to legal, regulatory and professional constraints,[10] as well as the poiley limitations of the employer.

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[10] In the hospital context, for example, the Joint Commission on the Accreditation of Hospitals requires for accreditation (and therefore third-party reimbursement to hospitals) that there be an "organized medical staff [with] overall responsibility for the quality of all medical care provided to patients, and for the ethical conduct and professional practices of its members as well as acounting therefor to the governing body." *Accreditation Manual for Hospitals*, 1973, at 35. For the attorney, his or her conduct is governed by the applicable canons of ethics, which necessarily determine one's obligations and responsibilities to the client, mandating compliance with those canons before even the employer's regulation. In higher education, teaching method has been protected by the 1940 *Statement of Principles on Academic Freedom and Tenure* of the American Association of Colleges and the American Association of University Professors, almost uniformly adhered to among institutions of higher education. Furniss, *Faculty Tenure and Contract Systems: Current Practice*, American Council on Education Special Report (July 27, 1972).

While management may assign a problem to an engineer or lawyer whom it employs, it hardly can dictate the solution that employee finds. The extent to which management utilizes that solution may often depend on the competence of the professional and the job done in arriving at and recommending that solution. The fact that management may ultimately use or implement and then profit from that solution does not render its creator a supervisor or manager; it reflects, rather, on the competence of the employee in fulfilling the professional mission delegated to him or her.

Thus, the faculty, individually and collectively, are delegated responsibilities for the development of curriculum and academic standards and, to a limited extent, evaluation of the professional merits of other faculty. Faculty fulfillment of these delegated responsibilities may, in fact, advance the best interests of the educational venture. But the fact that faculty recommendations in these areas may often be adopted by management is not reflective of their managerial or supervisory authority, but rather of the professional competence of the individual faculty member or the faculty body involved.

This dynamic between the advisory and consultative role of the faculty and the ultimate authority of the University trustees is central to the Board's rationale in faculty bargaining unit determinations. The ultimate authority of the University Board of Trustees, as delegated to and implemented by the administration, is a real part of the governance of the institution and its faculty. Where faculty recommendations become University policy, they are processed through faculty committees, then considered by deans and directors, then reviewed between the deans and Vice-Presidents, and ultimately reviewed and acted upon by the President for the Board of Trustees. Throughout this process,

the power of veto by administration officers and deans over virtually all aspects of faculty action is known at the University as more than a mere potential.

Although the record here shows involvement of the University faculty in many areas of the governance of the academic program, that involvement is not only delimited by their professional expertise, but is subordinate to managerial policy over which they exercise no control. The governing body of the University is the Board of Trustees which includes no faculty (A. 729). The Executive Council, which deals with policy on a University-wide basis, sits under the board of trustees; its membership is appointed by the President and is statutorily limited to University officers (A. 41-42). The University officers and administration include no faculty in the bargaining unit, and the deans are the respective chief administrative officers of each school, reporting to the University Vice-Presidents and President (A. 9-10, 94, 116-117; Tr. 155).

The President is exclusively authorized to hire full-time faculty upon recommendation of the dean or director of each school (A. 1179). Prior to any recruitment of new faculty, he must authorize the filling of an open position (A. 404; Tr. 3660). The dean of *each* school will interview and screen the merits of each candidate after preliminary screening by faculty (A. 210, 271-72, 404-05, 588). When the recommendations are forwarded to the President, he actively participates in the decision-making (A. 577-78, 593).

Rank, salary rate and term of appointment accompany the President's appointment. Although faculty at only two schools submit recommendations in these regards (A. 403-04, 407, 627-28), the available budget line authorized by the administration generally determines the rank and salary of a new appointee (A. 356-57, 405, 553, 623).

Most schools of the University have faculty committees which submit recommendations on faculty promotions to their respective deans (A. 193-94, 264-65, 395-96, 529-30, 619, 742). The dean then refers his own recommendation with that of the faculty committee for an independent review by the Vice-President for Academic Affairs, who has on a number of occasions rejected the recommendations of faculty in his denial of promotions (A. 193, 616-17, 619-20, 742). The role of the Vice-President of Academic Affairs is central in this and most other faculty personnel decisions, as he described it:

> "All recommendations for promotion finally wind up on my desk . . . I evaluate them . . . [and] in the course of going through these recommendations, therefore it is common for me to have to be in touch with the dean to ask for additional information, or to express problems that I am having in seeing how that recommendation is arrived at. . . . I have had conversation with almost every dean who has recommended every promotion in those terms (A. 56-58).
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> "[After consultation with the dean, I draw my own conclusions] so it becomes clear to me that it is not merely sort of an internal routine rubber-stamp promotion." (A. 59).

Tenure rules and procedures are promulgated by the Board of Trustees and were recently—and unilaterally—revised by the Board (A. 1191-97). The President has the sole authority, acting on behalf of the Trustees, to grant tenure (A. 1193-94), and the record here indicates that this authority is independent and absolute. Most schools do not even have a formal review procedure prior to the award or denial of tenure (A. 552; Tr. 2817, 4122), although some

departments or committees may make recommendations to the President through the deans, who have vetoed or blocked faculty recommendations for tenure (A. 232, 537-38, 667-68).

Faculty input in these decisions is not insignificant. The faculty may refer prospective new hires who are professional colleagues or associates. They may weigh and consider the qualifications of the individual as they relate to the academic needs and program of the department or school. They may advise the administration of the professional merits or distinction of the work of a colleague, even as it may relate to one's standing in the department or school. But the role of the faculty of Yeshiva University in these areas is advisory, at best, and circumscribed by the scope of professional expertise of the faculty as it relates to the academic or professional judgment involved.

Despite the exercise of such judgment by faculty, the needs and exigencies of the institution ultimately govern. University administration applies a separate and distinct perspective to the recommendations referred to it. While the faculty may render professional judgment on the merits of a professional, University officers first independently review that judgment and then balance its consequences with managerial and fiscal policy in which the faculty plays no determinative or advisory role.

The record indicates that the administration has not only rejected faculty judgments on academic merits in these personnel decisions, but that its unilateral determination of managerial policy has even precluded advice and consultation from the faculty. Thus in 1971 and 1972, the President froze all faculty ranks and notified the faculty that no promotions or salary increases would be granted at the University (A. 688, 1459). At one school, the President froze all promotions between 1971 and 1974 (A. 742). At another school, the administration removed a depart-

ment chairman who had been elected by the faculty of the department because the dean felt the faculty member lacked sufficient distinction as an academician, (A. 410-11).

The lower court nonetheless characterized faculty involvement in such decision-making processes as "shared authority" in the governance of the University (Pet. App. 35a-36a). Even if deference were allowed to the fact-finding of the court, it assessed the role of the faculty without a distinction between its role as professionals in *influencing* decisions affecting the integrity of the academic programs of the University and its role in determining managerial policy as it implicates the operation of the University. It is this same distinction which allows professional employees coverage under the Act, but disallows their address to managerial prerogatives in the arena of collective bargaining.

The accomodation between collective bargaining and managerial prerogatives confines the former to hours, wages, and terms and conditions of employment, as Section 8(d) of the Act, 29 U.S.C. 158 (d), specifies. The Act leaves beyond the scope of mandated bargaining the input of professionals in the quality or character of the services delivered by the employer, which subjects remain under the ultimate and unilateral authority of management. Separating out those matters amenable to the bargaining relationship and those reserved to management is the function of the Board. The proper scope of faculty bargaining is thus not the academic integrity of the University's "product," but the economic matters of faculty hours, wages, and working conditions—a distinction not only capable of administration, but also fundamental to the administration of the Act by the Board.

When the House Committee on Education and Labor recently considered the question of the coverage under the Act of interns and residents, it favored legislative reversal

of the decision of the Board in *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), which excluded those physicians on the grounds that they were primarily students.[11] The Committee noted the analagous experience of faculty and other pofessional employees under the Act:

> "The other objection cited in *Cedars-Sinai*, and voiced by some witnesses opposed to the bill, was that house staff collective bargaining would necessarily implicate matters of education that are not suited to the bargaining process. . . . We find this objection untenable. The Act limits the scope of collective bargaining to wages, hours, and terms and conditions of employment, and we are confident that the Board can and will confine housestaff bargaining to such matters as distinct from those which are solely didactic in nature. Newspaper reporters bargain without improperly implicating freedom of the press, faculty at religious educational institutions bargain without improperly implicating freedom of religion, faculty at educational institutions bargaining without improperly implicating academic freedom, and housestaff can bargain without improperly implicating their education. State and local labor relations agencies have been able to distinguish proper subjects of housestaff bargaining—such as wages, vacations, hours, insurance coverage, uniforms, laundry, meals, on-call rooms, tenure, etc.—from purely educational matters, and we believe the Board can do the same." H.R. Rep. No. 95-980, 95th Cong., 2d Sess., 6 (1978) (Citations omitted).

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[11] The Court of Appeals of the District of Columbia Circuit has recently reversed this determination of the Board, finding the legislative history of the 1974 amendments to the Act dispositive on the issue of the *inclusion* of interns and residents under the Act, as amended. *Physicians National House Staff Ass'n* v. *Murphy*, — F.2d —, (D.C. Cir. 1979), 100 LRRM 3055 (April 16, 1979).

Whatever else the faculty and university administration relationship entails, it surely requires an address to faculty salaries, insurance benefits, work schedules, etc.—the staples of all collective bargaining contracts. The decision of the lower court fails to separate out in the faculty-administration relationship the economic subjects which are bargainable from those subjects of educational policy which are not. The Act mandates the performance of precisely that function of the Board. See Finkin, *The NLRB in Higher Education*, 5 U.Tol.L.Rev. 608 (1974). Although the University management and its faculty may share certain interests and even some expertise in fundamental aspects of the University's operations, the faculty may not impose that standing or expertise in the collective bargaining relationship where it does not affect their "hours, wages, and terms and conditions of employment" (29 U.S.C. 158(d)).

It is in particular regard to these aspects of faculty employment where the legislative purpose of the supervisory or managerial exclusion must be carefully scrutinized against the congressional intent to provide protection under the Act to professional employees. While the exercise of independent judgment and discretion by professional employees may often impact on the mission of the employer, the Board is charged with the responsibility to determine whether the unionization of such employees would impair the ability of the employer to operate its enterprise by dividing the loyalties of those workers who serve as its representatives. Inquiry must therefore be directed at the impact and practicability of such a bargaining relationship.

Is collective bargaining for faculty in higher education inconsistent with a managerial, rather than professional status, and would it thus create an imbalance of power in the collective bargaining process; or would it properly afford standing to the faculty to bargain at arm's length

with the employer on those terms and conditions of their employment, delimited under Section 8(d), 29 U.S.C. 158(d), of the Act? The now substantial experience of college and university faculty in collective bargaining relationships in both the private and public sectors reflects the apparent viability of that relationship, as 80 private and 302 public institutions of higher education were engaged in collective bargaining relationships with their faculty as of January 1979, including eight law schools and four medical schools, and 130,000 faculty and professional staff who have been unionized.[12]

The precise experience of the Yeshiva University faculty in dealing with its administration over hours, wages and terms and conditions of employment underscores the disparate standing and the distinct interests of the faculty *vis-a-vis* its management. That experience has borne out, on one hand, the practicability of a bargaining relationship at the University; and on the other hand, the shortcomings of that relationship without the protection of the Act.

Salary scales for most full-time faculty have long been determined according to negotiations between faculty welfare committees and University administration. Yeshiva College and Stern College, for example, have negotiated jointly with the University administration since 1968 in the determination of faculty salary scales (A. 687, 1457). The welfare committees from both schools consist of elected members of the full-time faculty (A. 233-34, 300). Most recently these welfare committees have jointly negotiated with the Vice-President for Business Affairs, establishing salary rates

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[12] These figures do not include the 90,000 faculty members of the public four-year colleges and universities of California, where collective bargaining rights were granted to the faculties, effective July 1, 1979. National Center for the Study of Collective Bargaining in Higher Education, *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education*, i-ii (1979).

for all full-time faculty at both schools, including department chairmen and senior faculty (A. 689-90). These rates are also given effect for the full-time faculty at Erna Michael College, one of the Jewish Studies Programs for the students of Yeshiva College (A. 309-10). The Yeshiva-Stern Welfare Committees have also taken up matters of fringe benefits and pensions, as well as retirement age (A. 689-91).

The Werzweiler Graduate School faculty Welfare Committee acts on behalf of the full-time faculty at Werzweiler in collective bargaining (A. 540). This welfare committee last negotiated with the University Budget Committee, composed exclusively of University administration and the dean of Werzweiler, and settled a two-year agreement of across-the-board salary increases for the entire full-time faculty (A. 541, 543). The faculty Welfare Committee at the Ferkauf Graduate School was established in 1967 pursuant to the School's by-laws and subsequently established a salary scale for the full-time faculty there. It has represented the faculty over such issues as sabbatical and sick leaves, retirement benefits, life insurance, etc. (A. 163, 674).

The full-time faculty at the Belfer Graduate School established a welfare committee in 1972, which also submitted salary proposals to the University administration for its full-time faculty (A. 485, 731-32). In the course of the spring and fall of 1973, the Ferkauf and Belfer Welfare Committees discussed their joint interests and reorganized as the Yeshiva University Graduate Faculty Association and in September 1973, submitted to the President a demand for recognition and collective bargaining demands for the full-time faculty at both the Ferkauf and Belfer Graduate Schools (A. 1451). The President responded through the respective deans:

> "I have been asked to inform you that University policy mandates that we pursue established channels

> of communication and procedure—*i.e.*, the Dean continue to confer with faculty committees and individual faculty members of the School on all administrative and academic matters. . . . I am therefore asking again that the members of the Welfare Committee meet with me and the University Budget Committee. . . ." (A. 1454, 1471).

Sabbatical policy is University-wide and set forth in the Faculty Handbook (A. 1197-99). In 1972, that policy was amended by the Board of Trustees unilaterally to limit the options available to the faculty (A. 67-68). That action was in response to budgetary problems at the University, and the faculty were allowed no part in the reformation of that policy (A. 696-97).

The retirement age of full-time faculty is also set forth in the Faculty Handbook, as established by the Board of Trustees, and any permission to extend the retirement age on a semester-to-semester basis must come from the President (A. 68). The Yeshiva College faculty, joined by the Sterm College faculty, recently sought to discuss through their welfare committees policy in this area, but the President refused to accept faculty action on this subject (A. 712-14). Faculty fringe benefits, including medical, hospital and life insurance, pension, tuition grants to relatives, and allocations for professional travel (requiring the dean's permission) are set forth in the Faculty Handbook, as unilaterally formulated and approved by the Board of Trustees (A. 1179).

The faculty have accordingly established some bargaining history with University management. Those negotiations and "agreements" have been limited to areas traditionally covered in collective bargaining. The management of the University has not "bargained" with the faculty

over those areas or concerns which management traditionally retains as it prerogatives.

Thus, in matters of curriculum and student affairs, faculty involvement is precisely limited to areas of their professional expertise, and ultimately checked by supervisory or managerial authority. Faculty play an active role in the formulation and development of curriculum, as do the deans and even the students at the University (A. 325-26, 357, 504, 564, 601-02). This role at various schools may be through committees, departments, faculty (and student) assemblies (*id.*). In each case the faculty usually act by consensus, with the dean's usual approval following (*id.*). The faculty may in a similar context work out requirements for majors and undergraduate degrees, as well as standards for admissions, grading, examinations, and graduation, although they must conform where applicable, to requirements of the New York State Department of Education (A. 191, 195-96, 254-55, 315-16, 360-61, 375-76, 506, 510, 519, 569-70, 598-99, 605).

In each of these areas, faculty action is nonetheless circumscribed by University policy and direction, with direct participation and direction from University officers, such as the Vice-President for Academic Affairs, the Registrar, and deans and directors of the schools. Thus the Vice-President for Academic Affairs testified:

> "All of our academic planning at the university has financial implications and financial needs, and therefore, just as I supervise and coordinate the academic planning throughout the university, Dr. Socol does so with respect to the fiscal wherewithal for such planning. He is the head of what they call the Office of Financial Services, of the University." (A. 75).

The Registrar likewise takes part in matters regarding student standards and grading (A. 609-10, 661-63), while students also contribute to decision-making in these areas as members of various curriculum and standards committees, as well as other student-faculty bodies at most of the schools (A. 247-48, 359, 523). Most critically, however, the deans play an active role in each of these areas, usually maintaining the final authority at each school to implement any change in curriculum or standards (A. 204, 253-54, 360-61, 368, 601-02, 705-06).

With even Committees on Committees, faculty action in these areas originates in an intricate committee structure which generally refers all action to the faculty as a whole, where the collegiate consensus is referred to the dean for his action within the constraints set and enforced by the University administration. The hierarchy is the same at each school and division, with the ultimate authority with the deans and administration to restrict and define policy according to that which emanates down from the Board of Trustees, rather than up from any collegial body of faculty.

While faculty, like other professional employees, exercise substantial authority in "matters of importance to the employer's financial and other managerial interests," Congress nonetheless chose to afford such professional employees protection and coverage under the Act. *Westinghouse Electric Corp.*, 163 NLRB 723, 726 (1967), *enf'd*, 424 F.2d 1151 (7th Cir. 1970), *cert. denied*, 400 U.S. 831. The Board explained in *General Dynamics Corp., Convair Aerospace Div.*, 213 NLRB 851, 857-58 (1974):

> "Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, professional employees plainly are not the same as management employees

> either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction. Likewise, technical expertise in administrative functions which may involve the exercise of judgment and discretion does not confer executive-type status upon the performer. A lawyer or a certified public accountant working for, or retained by, a company may well cause a change in company direction, or even policy, based on his professional advice alone, which, by itself, would not make him managerial."

Thus there is no issue here over the exercise of professional *influence* by the faculty on the academic program of the University. But if faculty exercise *authority* in the precise areas enumerated under Section 2(11), the question of the existence of that authority; it requires a conclusion as to on whose account and for what purpose such authority may be exercised.

C. An Interest Analysis of Faculty Authority.

The lower court recognized that the Board has consistently denied managerial or supervisory status to faculty in higher education on the grounds that the faculty act on their own behalf and not on behalf of the employer (Pet. App. 32a-33a). The court rejected this finding and conclusion of the Board and found that faculty action in university governance is rooted in "the very nature of the educational process" and based on the concept of "shared authority," originating in the Middle Ages (*id.*). In sum, the court said, there is "no significant divergence between the interests of the faculty and those of the administration or

the Board of Trustees" (*id.* at 32a). The Board's "attempt" to dichotomize those interests, it said, is a "strained, artificial separation" because:

> ". . . the faculty has initiated, and the administration has repeatedly accepted, major policy determinations which constitute *the essence of the University's educational venture.* We cannot conclude that the full-time faculty here has acted in its own interest." *Id.* (Emphasis supplied).

It is clear that a determination of either supervisory or managerial status requires a finding that the employees act in the interest of the employer. Section 2(11) thus defines those areas of authority in which an employee must act "*in the interest of the employer*" to render him or her a supervisor.[13] In *Jas. H. Matthews & Co.* v. *NLRB*, 350 F.2d 432, 434-35 (8th Cir. 1965), *cert. denied*, 385 U.S. 1002 (1965), the court summarized the relevant judicial analysis in review of a Board decision determining the nature of an employee's exercise of authority in the areas enumerated under section 2(11) of the Act:

> " '[I]t is not alone that (the employee) may hire or fire or lay off or discipline. He must do so in the interest of the employer * * * (T)here must be a determination of status based upon the 'nature' of the supervisory position and 'how completely the responsibilities of the particular position identify the holder of the position with management,' all 'because of the infinite possible variations in responsibilities enumerated in § 2(11)' * * *" *International*

[13] Those who exercise such responsibilities in their own interest are not supervisors under the Act. See, *e.g.*, *Stop & Shop Companies, Inc.* v. *NLRB*, 548 F.2d 17, 19 (1st Cir. 1977); *NLRB* v. *Wentworth Inst.*, 515 F.2d 550, 557 (1st Cir. 1975); *International Ladies' Garment Workers' Union* v. *NLRB*, 339 F.2d 116, 121 (2d Cir. 1964).

> *Union of United Brewery, etc. Workers* v. *N.L.R.B.*, 111 U.S. App. D.C. 383, 298 F.2d 297, 303, *cert. denied*, 369 U.S. 843 . . . (quoting from *Local 636 Plumbers* v. *N.L.R.B.*, 109 U.S. App. D.C. 315, 287 F.2d 354, 362)."

The court then continued to discuss its discretion in review of the Board's determination on this subject:

> "And where, as here, 'the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially,' the reviewing court's function is limited. * * * (T)he Board's determination * * * is to be accepted, if it has 'warrant in the record' and a reasonable basis in law.' *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 131. . . ." *Jas. Matthews & Co.* v. *NLRB*, *supra* at 435.

A similar analysis pertains to the determination of managerial status under the Act. This Court concluded in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 286-87 (1974), that employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer" are excluded from coverage under the Act. In the Court's analysis of the legislative and adjudicatory history supporting its holding, the Court approved the criteria for determining managerial status already applied by the Board and the courts, which inquired whether the employee's interests are "more closely identified" or are "closely aligned" with management.[14]

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[14] The decision notes the basis for the exclusion of managerial employees under the Act summarized in *Retail Clerks Int. Ass'n.* v. *NLRB*, 366 F.2d 642, 645 (D.C. Cir. 1966) (Burger, J.), *cert. denied*, 386 U.S. 1017 (1967): "Congress intended to exclude from the protection of the Act those who comprised a part of 'management' or were allied with it on the theory that they were the one[s] from whom the workers needed protection." 416 U.S. 288-289, n. 16.

Id. at 283-89. In remanding to the Board, the Court instructed: "[T]he question whether particular employees are 'managerial' must be assessed in terms of the employees' actual job responsibilities, authority, *and relationship to management.*" *Id.* at 290, n. 17 (emphasis supplied).

The lower court's decision effectively determines that the *entire* faculty of the University are "closely aligned" and "identified" with management, in whose interests they exercise their putative authority. The court does not distinguish among members of the faculty—instructors or other non-tenured faculty, relative to senior professional faculty or even department chairmen. For the purpose of its determination of the nature of authority which faculty exercise—its "interest" analysis—the court depends on a collectivization of the faculty voice and authority. It cites no evidence of individual faculty members exercising the authority it defines as "shared authority" (Pet. App. 35a).

But when the court considers the criterion of the Board that the collectivization of faculty authority militates against a determination of the supervisory or managerial status of individual faculty members, it incongrously concludes that the "collective authority" doctrine is not a "realistic interpretation" of section 2(11), and rejects its application to the definition of supervisory status (Pet. App. 31a).[15] But even if the Board's interpretation is valid, the court notes, the faculty are, collectively, managerial employees, excluded under the rationale of *NLRB* v. *Bell Aerospace Co., supra* (Pet. App. 31a-32a).

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[15] The court acknowledges that "[s]ection 2(11) does, however, state that it is applicable to an 'individual' who possesses the enumeration indicia of supervision" and that "if read literally the statutory definition can be construed not to cover full-time faculty" (Pet. App. 29a-30a). It nonetheless concludes that the "Board's interpretation is not the only reasonable reading of the language of section 2(11)" (*id.*), and substitutes its own judgment for that of the Board in another "reasonable reading" of the statute.

Under the court's analysis, each newly hired instructor, as well as his department chairman and every faculty member in between, formulate and effectuate policy with an alignment and identification with management. The court thus holds that all faculty are supervisors and managers, although they manage or supervise no other full-time faculty. The entire faculty are, the court seems to say, supervisors who supervise no subordinates;[16] managers, who manage no other personnel. All full-time faculty, along with the deans, administrators, Vice-Presidents, the President and Board of Trustees stand together, the court would have it, as a "collegiate," managerial body, including every full-time professional member of the academic community of the University.[17]

The line between the faculty body and the University administration is virtually obliterated by the court. Although the court concludes that "the University has accepted [faculty determinations affecting the essence of the University's educational venture] without hesitation so consistently" (Pet. App. 36a), it never denies or controverts the processes in University governance which require virtually every academic and personnel action to be reviewed, approved and ultimately implemented by the administration. Inherent in these processes is the separation

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[16] Section 12(b) of the Act, however, specifically includes under its coverage the subordinate professional employee who works "under the supervision of [another] professional. . . ." 29 U.S.C. 152(b).

[17] The meaning of the court's decision makes the Board's common inquiry into the ratio of supervisory to non-supervisory employees in a bargaining unit determination meaningless. See *Monarch Federal Savings & Loan*, 237 NLRB No. 116 (1978); *Brattleboro Memorial Hospital*, 226 NLRB 1036 (1976); *Russel S. Kribs Assoc., Inc.*, 181 NLRB 1109 (1970). The University argued before the lower court in its brief and at oral argument against the Board's inclusion of department chairmen in the bargaining unit precisely on the grounds of the "incredibility" of the "high supervisory ratios" which would result from their inclusion. Univ. Brief at 4, 44-45.

between the faculty body and the supervisors and managers of the University.

In its "interest analysis" the lower court fails to recognize or distinguish the professional mission of the faculty as employees relative to the responsibility of the employer to operate the institution according to fiscal and other exigencies and concerns outside of the University's "educational venture." Thus the decision of the court is silent with respect to the relationship between the faculty and administration in the processes affecting the determination of faculty hours, wages or terms and conditions of employment. The court focuses instead on "shared authority" in action relative to the merits of the academic programs or "educational venture" of the institution;[18] precisely those areas which comprise the professional component of faculty employment.

Whatever authority the faculty may possess at the University depends on the *deference* afforded to their action *by the administration.* No faculty body or individual faculty members at the University are invested with the authority to determine policy even in matters of curriculum and degree requirements, as well as in the selection, retention and promotion of colleagues. There are no University statutes, by-laws or other directives which grant to the faculty any vested authority in the decision-making processes here at issue. The faculty are instead advocates in those processes, speaking for the advancement of their professional goals and interests. The extent to which their voice is heeded depends not only on the wisdom or appropriateness of the

[18] While the Union recognizes the relevance of the input of the faculty in these areas, it must respectfully differ with the conclusion of the court that "the University has accepted [such input] without hesitation so consistently" that the Board's determination that faculty act in their own, rather than in the interest of the employer, is erroneous. See, *e.g.*, pp. 42-51, *infra.*

action espoused, but ultimately on unilateral determinations by the administration as to whether such action corresponds with the fiscal and managerial constraints of the University.

Thus no matter how academically sound the expansion of a department or school may be, and how effectively it may be urged by the faculty, any such action will depend on the ability and choice of management to fund and manage any such expansion; no matter how meritorious certain faculty members may be for promotion or tenure, and how strenuously their applications have been urged by their faculty colleagues, only the administration will determine whether the University will assume the obligations of such personnel commitments. Precisely such a dichotomy arose when the Administration froze all ranks and tenured lines, allowing no action on faculty recommendations for promotion and tenure for almost two years (A. 1278, 1459). On another occasion, a faculty member grieved the denial of her reappointment before a faculty committee, which reported that it supported her reappointment and would advise the dean and president accordingly, but that it was *without authority* to change her employment status (A. 1313-14).

The lower court seems to say, however, that because faculty recommendations generally find embodiment in University policy as a result of their acceptance by the administration, the faculty exercise such authority as to warrant their exemption from the Act as supervisors and managers. The effect of that ruling is to condition the definition of the faculty's status on the extent to which the administration defers to the articulated interests and goals of the faculty. The extension of such a doctrine would allow an employer to establish that certain workers were supervisors or managers by allowing to them an advisory role in certain matters of managerial or supervisory interest; and if their advice

was consistent with management's own objectives, by then accepting that advice.

From another perspective, this doctrine bases managerial identity or supervisory authority on the influence which an employee or group of employees may wield, rather than on the authority invested in their positions. Where an employee may bring to bear certain judgment on the operations of the employer, the employer's reliance on or utilization of that judgment (insofar as it conforms to its own objectives) may then, in the construct of the lower court, be the basis of the employee's exclusion from coverage under the Act. In applying such a doctrine to the circumstances of the University, the lower court found that *all* faculty enjoy such influence as to warrant their exemption from coverage.[19]

The decision of the lower court not only merges all faculty into a single mold, each member enjoying sufficient authority as to render him or her a managerial representative, but it merges the collective interests and authority of the faculty with those of the administration. The University, the court seems to say, is a joint enterprise of faculty and administration, without significant delineation between roles of faculty governance and university management. But while the court points to an overlap of faculty and managerial interests, it fails to recognize the entirely separate tracks of authority between faculty and

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[19] In the context of Yeshiva University, the lower court failed to note the significant variations in the relationships between faculty and administrative at the ten schools of the University involved in these proceedings. In some schools, for example, the faculty play no role in the tenure, promotion and other personnel decisions, while in other schools faculty committees submit recommendations in these regards to the administration. The record here is replete with evidence of the disparate practices, policies and standing of the faculty at the various schools, relative to the supervision or management of the University. See, *e.g.*, Point III, *infra* at 42-51. The court nonetheless found that all faculty of the University, irrespective of their rank, tenure, or school, enjoy supervisory and managerial authority.

administration, which comprise the decision-making processes of the University.

A study of the decision-making processes and authority at New York University, which that University offered in the hearings on its faculty's representation petition as an expert, scholarly source,[20] aptly draws the distinction between the exercise of *influence* by faculty on matters of professional, academic concern on one track, and the possession of formal, bureaucratic *authority* on the other:

> "The university's bureaucracy is not only multilayered but characterized by complicated parallel authority structures. At least two authority systems seem to be built into the university's formal structure. One is the *bureaucratic* network, with formal chains of command running from the trustees down to individual faculty members and students.
>
> "The other authority system is a *professional* network, for at all levels there are formal mechanisms for bringing the expertise of the faculty into the decision-making process. It is fascinating to note how this parallelism is built into the formal structure of the university. . . . The tangled system of committees, faculty meetings, and faculty councils, which is only hinted at in the organization charts, is really not just 'bureaucratic madness.' On the contrary, if it is madness at all, it is 'professional madness.' The parallelism between the bureaucratic and professional authority structures ensures that professional goals will have strong advocates in the decision-making councils. Duality of authority and ambiguity of power are the price of ensuring that faculty expertise will have its say." J. Baldridge, *Power and Conflict in the University,* 114 (1971) (emphasis in original).

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[20] *New York University, supra,* Case Nos. 2-RC-15719, 15757, Transcript at 311-12.

The Board has accordingly distinguished the exercise of influence by faculty over matters of *professional* concern and the possession of formal *bureaucratic* authority since its entrance into the "unchartered area" [21] of faculty unit determinations in higher education. That distinction becomes particularly relevant in view of the unique mode of organization and governance which the collegial model presents.[22] The Board's decisions in the arena of higher education thus comport with the legislative scheme of the Act to provide coverage to professional employees who do not exercise such authority and who do not share such interests with management as to warrant a finding of their alignment or identification with the employer.

The faculty of Yeshiva University are not representatives of the University. They are not employed on the premise or condition that their interests correspond with those of the management of the University. Rather, the premise of their employment is the professional competence which they bring to the University; and the measure of their performance is the excellence of their professional competence. That competence does not depend on an undivided loyalty to the management of the University.

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[21] *C. W. Post Center of Long Island Univ., supra* at 905.

[22] The Board thus noted in *Adelphi Univ., supra* at 648:

> "The difficulty both here and in *Post* may have potentially deep roots, stemming from the fact that the concept of collegiality, wherein power and authority is vested in a body composed of all of one's peers or colleagues, does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world. The statutory concept of supervisor grows out of the fact that in those organizations authority is normally delegated from the top of the organizational pyramid in bits and pieces to individual managers and supervisors who in turn direct the work of the larger number of employees at the base of the pyramid."

II.

Congress has indicated its approval of the jurisdiction exercised by the Board over faculty in higher education.

In 1974, Congress enacted amendments to the Act to extend coverage to employees of nonprofit health care institutions. In its consideration of that legislation, Congress not only recognized the experience of the Board in its exercise of jurisdiction in higher education, but specifically addressed the issue of the inclusion of professional employees in the health care industry with reference to the Board's treatment of professional employees in higher education and elsewhere.

These amendments were intended to complete the circle of coverage which had already been afforded to most other nonprofit employers under the Act. In 1947, amendments to the Act had been proposed in the House of Representatives to exempt all charitable and educational organizations from Board jurisdiction. In the companion Senate legislation, the exclusion was limited to nonprofit hospitals. The Senate proposal was adopted, as the Joint Conferees point out, because the Board had already concluded on its own part that most charitable and educational organizations were exempt from coverage under the Act on the grounds of their insubstantial effect on interstate commerce. See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947).[23]

In *Trustees of Columbia University*, 97 NLRB 424 (1951), the Board accordingly cited the Conference Report

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[23] The Report of the Senate Committee on Education and Labor on the National Labor Relations Act, as originally proposed before Congress, thus cited as an example of employer-employee relations excluded from coverage a college professor's dispute with his college. S. Rep. No. 573, 74th Cong., 1st Sess., 7 (1935). That example related to the then contemplated exclusion from coverage of charitable and educational organizations, *per se*, in view of their perceived insubstantial effect on interstate commerce.

in explaining its refusal to assert jurisdiction over institutions of higher education. Subsequently, that decision and its reasoning were overruled by the Board in *Cornell University,* 183 NLRB 329, 331 (1970), where the Board concluded:

> "The fact remains that Section 2(2) contains no express exemption for nonprofit employers and that subsequent legislation has indicated a congressional preference that the Board should favor asserting jurisdiction in lieu of creating a no-man's land of non-regulation."

Thus in 1974, when Congress extended the coverage of the Act to nonprofit health care institutions, the *Cornell University* precedent and its progeny were well ensconced in a line of Board precedent, consistently asserting jurisdiction over institutions of higher education and their faculty.[24] In the course of the Congressional debate over the 1974 amendments to the Act, no controversy arose over the continuation of the jurisdiction assumed by the Board over institutions of higher education or their faculty. To the contrary, both the House and Senate recognized the experience of the Board in higher education, as they ultimately removed the sole remaining exclusion of nonprofit employers by legislating health care institutions under Board jurisdiction. P.L. 93-360, 88 Stat. 395, 93rd Cong., 2d Sess. (1974).

The Report of the House Committee on Education and Labor, which recommended that amendment to include nonprofit hospitals within the definition of "employer" under the Act, reviewed the history of the Board's initial exemption of certain eleemosynary, charitable and educational institutions from coverage under the Act, including specifically the exemption of colleges and universities in 1951 pur-

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[24] See p. 11.

suant to *Trustees of Columbia University, supra.* The Report then concluded:

> "Experience indicated that the withholding of Labor Board jurisdiction did not cut down on the number of strikes nor labor unrest. Accordingly, in recent years, the Labor Board began to assert jurisdiction over areas that it had formerly left alone:
>
> 1. Private, profit hospitals. . . .
> 2. Private, profit nursing homes. . . .
> 3. Nonprofit, cooperative insurance companies. . . .
> 4. *Private colleges and universities.* . . .
>
> The only broad area of charitable, educational, eleemosynary institutions wherein the Labor Board does not now exercise jurisdiction concerns the nonprofit hospitals, explicitly excluded from the Labor Act by § 2(2)." H. Rep. No. 92-1252, 92nd Cong., 2d Sess., 4 (1972) (emphasis supplied)

When the legislation was debated in the Senate, Senator Harrison Williams, who chaired the Labor and Public Welfare Committee which recommended the amendments to the Senate, addresed his colleagues:

> "The current exemption from the act of nonprofit hospitals is not only inconsistent with the protection enjoyed by proprietary hospitals and other types of health care institutions, but it is also inconsistent with the coverage of other *nonprofit colleges and universities,* philanthropic lodging houses, nonprofit educational broadcast stations, and nonprofit, cooperative insurance companies." 120 Cong. Rec. 12938 (1974) (emphasis supplied).

In the House, supporters of the legislation similarly noted the Board's exercise of jurisdiction and involvement in the area of higher education since its decision in *Cornell University, supra.* See, 118 Cong. Rec. H. 7249, 7251 (1972); 120 Cong. Rec. H. 4590 (1974). Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare in 1973 not only included testimony concerning the Board's exercise of jurisdiction in higher education, but also testimony regarding the Board's treatment of professional employees in fields other than health care, including colleges and universities. Testimony before the Subcommittee spelled out at length the concept of "professional direction" as distinct from supervisory authority in the specific context of faculty action in colleges and universities. Testimony before the Subcommittee cited and summarized the principles enunciated by the Board in *C.W. Post Center of Long Island University, supra; Fordham University, supra; Manhattan College,* 195 NLRB 65 (1972); and *Florida Southern College,* 196 NLRB No. 133 (1972). See Hearings on S.795 and S.2292, Subcomm. on Labor, S. Comm. on Labor and Pub. Welfare, 93rd Cong., 1st Sess., 316-19 (1973).

In its enactment of the 1974 amendments, Congress rejected specific proposals from professional organizations to amend section 2(11) so as to exclude specifically certain professionals from the definition of "supervisor." Both the House and Senate reports on the legislation emphasized, however, the distinction between supervision *in the interest of the employer* and supervision *in a professional capacity in furtherance of a professional mission.* Thus the Report of the Senate Labor and Public Welfare Committee noted:

> "The Committee has studied [§ 2(11) of the Act] with particular reference to health care profes-

> sionals, such as registered nurses, interns, residents, fellows, and salaried physicians, and concludes that the proposed amendment is unnecessary because of existing Board decisions. The committee notes that the Board has carefully avoided applying the definition of 'supervisor' to the health care professional *who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer.*
>
> "The Committee expects the Board to continue evaluating the facts of each case in this matter when making its determinations." S.Rep. No. 93-766, 93 Cong., 2d Sess., 6 (1974) (emphasis supplied).[25]

Thus Congress enacted no amendment to section 2(11) in 1974, deeming such amendment "unnecessary because of existing Board decisions" relative to health care and other professional employees. Although the Board in the instant proceeding applied precisely those standards which it enunicated in its initial decisions concerning faculty in higher education,[26] the lower court rejected those standards as "unjustified [and] arbitrary" (Pet. App. 42a). Its decision rejects not only the soundness of those standards as relied upon by Congress, but as consistently applied by the Board[27]

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[25] The Board has thus carefully limited its definition of health care professionals as supervisors, separating their "primary and indeed overriding responsibility . . . to maintain the best possible patient care" from alleged supervisory action in the interest of the employer. *Mercy Hospitals of Sacramento,* 217 NLRB 765, 767 (1974). See also *St. Mary's Hospital,* 220 NLRB 496 (1975); *Trustees of Noble Hospital,* 218 NLRB 1441 (1975).

[26] See p. 11 and n.5, *supra.*

[27] See n.5, *supra.*

and as recently upheld by the First Circuit Court of Appeals in *Trustees of Boston University, supra.*

In *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1973), this Court summarized the principle of statutory construction relevant here:

> "[A] court may afford great weight to the long-standing interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. *In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.*" *Id.* at 274-75. (emphasis supplied; citation omitted).

In *NLRB* v. *Catholic Bishop of Chicago*, — U.S. —, 47 U.S.L.W. 4283, 4287 (3/21/79), the Court again applied this principle of statutory construction, concluding that the 1974 amendments cannot be read "as reflecting Congress' tacit approval of the Board's action" in affording coverage to employees of church-operated schools, since the Board did not assert such jurisdiction until after the 1974 amendments. In the circumstances here at issue, the Board had extended its jurisdiction to private institutions of higher education *and* their faculties well before the enactment of the 1974 amendments, and Congress' recognition of that action was neither tacit nor implicit. The legislative history clearly reflects explicit congressional recognition and approval of the Board's exercise of jurisdiction in private higher education.

The decision of the lower court stands alone and unsupported in its finding that the Board's jurisdiction and standards, as applied in virtually all cases involving faculty in higher education, are in conflict with the Act.

III.

The decision of the Board in the underlying representation proceeding was supported by substantial evidence; and the court below failed to review the record in that light, but instead improperly imposed its own findings and conclusions over those of the Board.

The lower court failed to apply the standard of substantiality of the evidence in its review of the factual findings of the Board and reached its conclusion despite the substantial evidence on the record in support of the findings of the Board. The Court did not defer to the expertise and fact-finding role of the Board, but imposed its judgment over that of the Board in the finding of facts on which it based its determinations of law. The court erred specifically as to the interpretation and application of certain material evidence.

In *NLRB* v. *Pacific Grinding Wheel Co., Inc.*, 572 F.2d 1343, 1347 (9th Cir. 1978), the court "commence[d] by reciting the usual litany" relevant to its scope of review of a Board determination on unfair labor practice charges, like those here at issue, under section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5):

> "Our power to review the factual findings of the NLRB is limited, for such findings are conclusive if supported by substantial evidence on the record considered as a whole. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). Thus, if there is evidence to support each of two conflicting views, the findings of the Board must be allowed to stand despite the fact that we might have reached the opposite conclusion on our own. *NLRB* v. *Walton Manufacturing Co.*, 369 U.S. 404, 82 S.Ct. 853, 7 L.Ed. 2d 829 (1962); *Universal Camera Corp.* v. *NLRB, supra.*"

Precisely on point with the scope of the lower court's review of the Board's determination here at issue, the First Circuit Court of Appeals in *Boston University, supra*, 575 F.2d 301, 305, discussed the standards of judicial review of a Board determination as to supervisory or managerial status:[28]

> "The question of who are supervisors or managerial employees is one of fact for the Board, *Stop & Shop Companies, Inc.* v. *NLRB*, 548 F.2d 17, 18 (1st Cir. 1977), aff'd 401 U.S. 137, 91 S.Ct. 599, 27 L.Ed. 2d 737 (1971), and the expertise of the Board in dealing with the gradations of authority between 'supervisors' and 'employees' can be so subtle that determining who is a supervisor must 'as a practical matter' involve 'a large measure of informed discretion.' *NLRB* v. *Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961)."

The lower court here concluded that the Board rendered its decision "without any analysis" and merely relied on doctrines promulgated in earlier Board decisions (Pet. App. 24a). But the Board, and its hearing officer, had before them evidence accumulated over twenty-one days of hearings, including over 4,600 pages of testimony and 200 exhibits.

There is no intention here to argue that the Board's determination on the record is incontrovertible, but rather that the Board rendered its decision on substantial evidence; and that the court failed to look to the substantiality of the evidence, but instead superimposed its judgment

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[28] "Keeping in mind the substantial evidence test," the court said, its review of the record upheld the Board determination that faculty department chairpersons do not exercise supervisory authority over other faculty (and their exercise of supervisory authority over non-unit personnel was insufficient to render them supervisors). *Id.*

on the weight and balance of the evidence over that of the Board. In this respect, the lower court erred.

Certain of the court's characterizations of the facts are relevant to review here in light of the deference owed to the Board in dealing with these "gradations of authority between 'supervisors' and 'employees.' " The following text lists only some examples of the court's findings of fact, viewed against a deeper analysis of the record:

> (i) "Dean Mirsky [of Stern College] has never made a faculty appointment which was not approved by a department chairman." (Pet. App. 9a).
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> The record shows, however, that the Dean takes the responsibility for the interviewing of all candidates after he has received authorization from higher administration officers for the filling of the vacancy (A. 210, 211-12). He has then overruled the faculty in decisions affecting nonrenewal (A. 241).
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> (ii). "The University President has granted the great majority of recommended promotions and has never overruled a negative recommendation [from the faculty at Stern College]." (Pet. App. 9a).
>
> The Dean at Stern College testified, however, that recommendations on promotions from the faculty will be "generally approved," but both negative and positive recommendations are referred to the Academic Vice President and President for independent review (A. 59, 218-19, 267-68). The President has nonetheless exercised his prerogative to freeze all faculty promotions, notwithstanding then pending recommendations (A. 1278, 1459).
>
> (iii) "[At Yeshiva College] senior professors screen applicants for faculty positions. [The dean]

and the senior professor then jointly make the hiring decisions with [the dean] *generally* accepting the recommendations of the senior professor." (Pet. App. 10a). (Emphasis added).

The record reflects, however, that the dean refers senior professors' recommendations to the President only after his independent review of the applicant's qualifications (A. 273). The dean noted that not all senior professors take this role seriously and some perform only perfunctorily, leaving the major burden to him (A. 274-75).

(iv) "[At the Belfer School], the hiring of faculty members and the length of their appointments are determined by a majority vote of the department. Dean Komar testified that his only role in hiring is his participation in the discussion and voting on applicants to his department. Decisions on promotion, tenure and non-renewal of faculty appointments are also made within each department by consensus. Komar stated that he does not believe he has the right to overrule such departmental decisions." (Pet. App. 14a).

The Dean testified, however, that he has not referred all department recommendations in these areas to the President (A. 473-74), as the Faculty Constitution at the School allows the dean the *authority* to disapprove such recommendations (*id.*). In any event, the President has not granted all promotion recommendations from the School's departments (A. 742).

(v) "The Promotions Committee effectively determines questions of faculty promotions [at the Ferkauf School]." (Pet. App. 15a).

The dean, however, sits on this Committee and has refused to act on recommendations from the Committee, thereby precluding promotions which require referral by the dean and action by the President (A. 668).

(vi) "The [Faculty Review] Committee has jurisdiction to review faculty grievances, particularly those concerning promotion and tenure . . . and is authorized to recommend action to the President." (Pet. App. 17a).

The record, however, refers to the facts of a single case before this Committee, where it concluded it had *no authority* to bring about the rehiring of a non-renewed faculty member. Its sole recourse, the Committee reported, was to refer the matter to the President "in whom ultimate responsibility rests. . . . He alone makes the crucial decision." (A. 133).

(vii) "The purpose of the [Academic Priorities and Resource Allocation] Committee is to provide a long-range scale of academic and fiscal priorities at Yeshiva . . . [and it] is empowered to reevaluate the objectives of the schools of the University. . . . It should be noted, however,that this committee at the time of the hearings had met only twice and had not focused upon particular problems nor made any specific recommendations." (Pet. App. 17a-18a).

This Committee was formed during the organization of the union and is composed of every dean and director and virtually every University officer and administrator except the President, as well as faculty representatives *elected* by their colleagues (A. 1175, 1171). The University's witness testifies that to date

the faculty do not know that this Committee is about (A. 332), and it has taken no substantive action and has not even determined its purposes (A. 332, 333).

The foregoing analysis is not intended to be exhaustive. At best, it is exemplary of the shading, nuances and different lights which the evidence may shed on the issue of the faculty's status. But the court not only erred in its review of the facts and in its virtually *de novo* analysis and findings, it also omitted reference to and reliance upon other crucial facts in this record. References to only a few examples may suffice in further support of the substantiality of the evidence on which the Board acted, and the failure of the court to apply that standard to its review:

(i) The President has denied a faculty resolution on retirement age (A. 712-13).

(ii) The President has rejected an amended bylaw for the Yeshiva College faculty, as proposed and passed by the Yeshiva College faculty (A. 694-95).

(iii) Deans will deny recommendations on department expense budgets from senior faculty or department chairmen (Tr. 2430).

(iv) The Registrar and other administrative officers have denied faculty recommendations regarding academic standards and transfer credits (A. 362).

(v) At the Belfer Graduate School, the dean has denied approval to the appointment of an *elected* department chairman (A. 410-11).

(vi) The dean at the Belfer School denied a request of the Library Committee to meet with administration officers over the contemplated move of the Belfer Library (A. 472, 1455).

(vii) The Belfer Faculty Committee formally protested "the failure to consult with the faculty on matters of concern to it," with specific reference to the dean's refusal to convene the Academic Credentials Committee and Faculty Committee to pass on qualifications of new appointees to the faculty (A. 724, 1469).

(viii) The Belfer faculty's election of a faculty representative to the University committee to plan the formation of faculty senate was unilaterally vetoed by the dean (A. 726).

(ix) The dean at the Ferkauf School has denied a tenure recommendation approved by the entire body of tenured faculty at the School (A. 632).

(x) The dean at the Ferkauf School has also vetoed faculty sabbatical requests (A. 671-72).

(xi) The dean at the Werzweiler School has denied a faculty committee recommendation for a new appointee and made an offer to a candidate of his own choosing (A. 525-28).

(xii) The dean at the Werzweiler School has denied faculty recommendations for the formulation and structure of a Committee on Academic Appointments, seeing the proposal as too "tight on the dean's collar." (A. 534-36).

Undoubtedly the University can point to corresponding incidents where faculty recommendations, requests and demands have been met by the administration, as well as virtual practices whereby faculty opinion has gained general acceptance. But the picture here is not one where there is not communication between faculty and administration,

nor where faculty judgment is disowned as either valueless or conflicting with the best interests of the University. Instead, the University maintains its discretion—in terms of unilateral and ultimate authority—to give what weight and import to collective faculty input as it may choose and deem consistent with its prerogatives and goals.

That analysis was properly made by the Board on the basis of the extensive record before it. Surely this Court cannot and should not undertake an analysis of the evidence, *except* to the extent that the underlying record here amply and aptly supports the determination of the Board. The propensity of the lower court to go further into the mass of the record was not only beyond its appropriate scope of review, but also caused it to err in its analysis. It not only overlooked evidence in apposition to its conclusions of fact, but it miscontsrued other evidence.

In a separate section of its fact-finding, the court analyzes and apparently relies upon the authority of the faculty at the Teacher's Institute for Women ("TIW") (Pet. App. 12a), where the University initially contended that four full-time and ten part-time faculty are employed. The court cites in this section the faculty's rejection of a proposal to move the School, and later in its conclusions of law refers to the same again (*id.* at 23a). The court also cites the Director of TIW as remarking: "The faculty is the School." (*id.* at 34a).

The court failed, however, to note that the Board made specific findings with respect to the faculty at TIW:

> "The record indicates that there are currently no faculty members at [TIW] holding full-time appointments with the University; rather the faculty listed by [TIW] as teaching a full 12-hour load are,

> in fact, part-time faculty without University appointment. Accordingly, such faculty are not eligible to vote in the election." Pet. App. 69a, n. 9.[29]

The court quite clearly weighed and relied on evidence of the role of the faculty at TIW, although the Union did not seek to represent these faculty and the Board found them to be excluded from the bargaining unit. The court surely did not find the Board's determination in this respect in error, since the question of the status of these faculty arose over the credibility of a University witness.[30] Since the court did not even address the issue of the inclusion of these faculty in the bargaining unit (and thereby overrule the Board's determination in this respect), the inference must follow that it overlooked the Board's footnoted exclusion of these faculty and the testimony of their director.

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[29] The Board noted also: "At the close of the hearing, the Petitioner indicated that it did not seek to represent faculty at [TIW]" insofar as they do not hold full-time faculty appointments, but are part-time faculty. Pet. App. 66a, n.3.

[30] The sole witness on the question of the status of faculty at TIW was its director. In response to a question as to the nature of his job, he referred to his notes and responded: "I consider myself as the executive arm of the faculty." (A. 388). The phrase happened to be identical to the self-description of the dean of James Striar School (A. 361) and the dean of Erna Michael College (A. 320), who had testified on the immediate hearing dates prior. The Hearing Officer granted a *voir dire* with respect to the notes held by the witness, who initially refused to turn them over (Tr. 3047-48). In the *voir dire*, he testified that his self-descriptive phrase merely came from his "flare for English" (Tr. 3050) and then ripped up the notes. The notes, pieced together, contained only the following markings: "faculty makes decisions and I cary them out"—"job security, subject job security, tenure" (Tr. 3049). The director of the TIW "did not know" whether his faculty participated in the retirement plan for full-time faculty of the University, and after University counsel offered to submit proof on that issue, he failed to do so (A. 389-90). University counsel acknowledged, however, that the faculty at TIW "may lack full-time faculty appointments in its formal sense" (Tr. 2990-93).

Speculation as to the relevance of the court's reliance on these facts is futile. But the court's failure to defer to the Board's fact-finding and expertise in defining and interpreting gradation of authority has caused its decision to go far beyond a determination as to whether there was substantial evidence on which the Board rendered its determination. The court instead judged the evidence anew and rendered an independent decision on its judgment of that evidence. The court erred both in the scope of its review and in the findings and conclusions it drew therefrom.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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